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Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries

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THE CONSTITUTIONAL INVALIDITY OF CONVICTIONS IMPOSED BY DEATH-QUALIFIED JURIES*

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In the landmark case of *Furman v. Georgia*[1] the Supreme Court held that under a system which allows a jury absolute discretion to decide when capital punishment shall be imposed, "the imposition and carrying out of the death penalty . . . constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[2] Thus, *Furman* apparently eliminates the death penalty as it is presently applied in this country.[3] Despite its far-reaching impact, however, *Furman* has left a number of questions unanswered. Perhaps the most important is the validity of convictions reached prior to *Furman* by juries chosen on the basis of their willingness to impose capital punishment.

Prior to 1968, it was almost universal practice for a state to authorize the exclusion of veniremen who evidenced conscientious scru-

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1 408 U.S. 238 (1972).

2 *Id.* at 239-40. The statutes under which the death sentences before the Court were imposed provided that upon a finding of guilt as to the specified crime, the jury had *absolute discretion* to determine whether or not a sentence of death should be imposed. *See* GA. CODE ANN. § 26-1005 (Supp. 1971) (murder); *id.* § 26-1302 (Supp. 1971) (rape); TEX. PENAL CODE ANN. art. 1189 (1961) (rape).

3 Two Justices clearly expressed the view that capital punishment may not be imposed under any circumstances. *See* 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). The other three concurring Justices explicitly noted that they were only ruling on the legitimacy of capital punishment as applied pursuant to the specific statutes before them. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring). Each of these three Justices distinguished legislative schemes under which the death penalty would be a mandatory punishment for a specific crime. *Id.* at 257 (Douglas, J., concurring); *id.* at 308-09 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring). Thus, the opinions implied that the death penalty could be imposed, if at all, only in those extremely rare situations in which a statute imposes a mandatory penalty of death. *See id.* at 307 nn.3-6 (Stewart, J., concurring). In such cases, however, the rarity of imposition of the penalty, combined with the absolute discretion of the jury, might well lead to a holding that the death penalty would constitute cruel and unusual punishment under a traditional eighth amendment analysis. *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910).

ples against capital punishment.[4] In that year, however, the Supreme Court, in *Witherspoon v. Illinois*,[5] held that the practice of excluding for cause veniremen who express reservations about capital punishment was unconstitutional because the remaining pool of potential jurors would be unduly biased in favor of imposing capital punishment on the defendant.[6]

Both defense counsel and prosecutors recognize that the exclusion of veniremen opposed to capital punishment favors the prosecution, not only with respect to the penalty determination but also with respect to the adjudication of guilt.[7] In *Witherspoon*, the Court for the first time dealt with the argument that the exclusion for cause of prospective jurors who had conscientious scruples against capital punishment subjected the defendant to a "prosecution prone" jury in violation of the accused's constitutional rights. Although it did not fully accept this theory, contrary to several lower court opinions,[8] the Court did not unequivocally reject the argument. Rather, the Court issued an implicit invitation to reassert the claim in a case where the evidence would more clearly support the appellant's contention.[9] Referring to the limited scientific evidence presented in *Witherspoon*,[10] the Court stated:

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4 *See, e.g.*, Law of March 31, 1869, § 4, [1869] Ill. Laws 26th Gen. Assembly 113 (repealed 1963).

5 391 U.S. 510 (1968). *But see* Paramore v. State, 229 So. 2d 855 (Fla. 1969), *vacated*, 408 U.S. 935 (1972) (upholding exclusion of juror who stated that it "would be a little hard" to bring in death penalty). *See generally* Comment, *Jury Selection and the Death Penalty*: Witherspoon *in the Lower Courts*, 37 U. CHI. L. REV. 759 (1970).

6 [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority. Witherspoon v. Illinois, 391 U.S. 510, 519-20 (1968) (footnotes omitted).

7 For example, there have been situations in which prosecutors have sought to obtain a jury on which none of the members were opposed to capital punishment even though they had no intention of asking the jury to impose the death penalty. *See generally* Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on the Issue of Guilt?*, 39 TEXAS L. REV. 545, 555 (1961).

8 *See, e.g.*, Springfield v. United States, 403 F.2d 572, 573 (D.C. Cir. 1968) (erroneously stating that *Witherspoon* and its companion case, Bumper v. North Carolina, 391 U.S. 543 (1968), held that jury from which veniremen were improperly excluded because of their views regarding death penalty can impartially determine guilt or innocence).

9 391 U.S. at 517-23. The nature of the Court's invitation was noted in a dissenting opinion:

[T]he majority opinion goes out of its way to state that in some future case a defendant might well establish that a jury selected in the way the Illinois statute here provides is "less than neutral with respect to *guilt*." . . . This seems to me to be but a thinly veiled warning to the States that they had better change their jury

> [T]he data adduced by the peitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.[11]

The Court underscored the siguificance of this language by adding that even a defendant convicted by a jury which was selected with the exclusion of jurors who "stated in advance of trial that they would not even consider returning a verdict of death"[12] "might still attempt to establish that the jury was less than neutral with respect to *guilt*."[13] The Court's language indicated that if new statistical data strengthened the contention that a jury selected by excluding those opposed to capital punishment would be more likely than other juries to favor the prosecution, the question of whether such a jury was "neutral with respect to guilt" would be ripe for reconsideration. Since the results of a number of post-*Witherspoon* studies are now available,[14] reconsideration of the constitutional issue left unresolved in *Witherspoon* is possible.

Such a reconsideration is particularly appropriate at this time for several reasons. First, if it can be demonstrated that the adjudications of guilt in many capital cases were constitutionally invalid, or at least constitutionally suspect, it would be unsupportable to allow any defendant-victim of a tainted verdict of this sort to be executed. Second, and most significantly, the resolution of the issue could have tremendous impact on the thousands of pre-*Furman* cases in which defendants were found guilty by death-qualified juries.[15] If it can be shown that

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selection procedures or face a decision by this Court that their murder convictions have been obtained unconstitutionally.

Id. at 539 (Black, J., dissenting).

10 *Id.* at 517-18 n.10; *see* notes 18-26 and accompanying text *infra*.

11 391 U.S. at 517-18 (footnote omitted).

12 *Id.* at 520. Subsequent studies show that this is a significantly narrower class of people than those who are opposed to capital punishment. The 1971 Harris Poll reveals that 36% of the population is opposed to capital punishment, but only 23% of the population would be willing to state that as a member of a jury they would refuse to vote for the death penalty under any circumstances. Louis Harris & Associates, Study No. 2016, at 3a, d (1971) (on file at NAACP Legal Defense and Educational Fund, 10 Columbus Circle, Suite 2030, New York, N.Y. 10019) [hereinafter cited as 1971 Harris Poll].

13 391 U.S. at 520 n.18 (emphasis in original).

14 *See* note 26 *infra*.

15 Adjudications of guilt were rendered by death-qualified juries not only in cases in

juries which were selected because of their favorable attitude toward capital punishment were made up of individuals who were also unduly biased toward the prosecution on the more general question of the defendant's guilt, then the validity of the convictions which those juries rendered is suddenly thrown into question.[16]

After referring to three of the five existing studies on the prosecution-proneness issue,[17] the *Witherspoon* majority concluded that the data adduced from these studies was "too tentative and fragmentary"[18] to justify overturning the conviction at issue. This conclusion was based partially upon defense counsel's failure to submit the studies at the trial court level as evidence of prosecution proneness, which prevented the Court from reviewing fully the substantive validity and accuracy of the

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which defendants were unconstitutionally condemned to death, but also in many of the much greater number of cases in which defendants were sentenced to a lesser punishment after being found guilty by a death-qualified jury of some crime in which the imposition of the death penalty was a possibility.

Despite the ruling in *Furman*, some states are continuing to seek the death penalty under their present statutes. *See* note 152 *infra*. Presumably, the constitutional validity of adjudications of guilt rendered by death-qualified juries will also be a siguificant issue in these cases.

16 The issue of a jury's "prosecution proneness" arises in a slightly different context under mandatory capital punishment statutes since the states may plausibly argue that their interest in maintaining capital punishment should allow them to exclude those veniremen whose "attitude toward [the mandatory] death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21 (1968). Assuming that it could be shown that the exclusion of these veniremen would lead to the selection of a jury which was not constitutionally neutral with respect to the determination of guilt,

> the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence . . . .

Id. at 520 n.18. A more detailed discussion of such statutes, however, is beyond the scope of this Article.

17 *Id.* at 517 n.10, *discussing* F. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (unpublished manuscript, Morehouse College, undated); W. Wilsou, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas 1968); H. Zeisel, Some Insights into the Operation of Criminal Juries 42 (confidential first draft, University of Chicago, November 1957).

While all of the studies referred to by the Court were unpublished at the time *Witherspoon* was decided, two of them have since been published. *See* H. ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT (1968); Goldberg, *Toward Expansion of* Witherspoon *Capital Punishment Scruples, Jury Bias and Use of Psychological Data To Raise Presumptions in the Law*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 53 (1969). In addition, a fifth study, unpublished at the time of the *Witherspoon* decision and not mentioned in the Court's opinion, has since been published. *See* Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970) [hereinafter cited as Bronson].

18 391 U.S. at 517.

studies' conclusions.[19] Thus, without disparaging the studies, the Court simply refused to speculate on their relevance and to use their generalizations to resolve the specific issues raised by the defendant's claim.[20] The amicus brief of the NAACP Legal Defense and Education Fund, cited with approval by the Court,[21] noted that even if these studies did show that juries selected with the exclusion of jurors opposed to the death penalty would be more likely to favor the prosecution, evidence concerning several other vital issues would still be lacking.[22] For example, the NAACP claimed that the Court would not possess any reliable information concerning:

> (1) what proportion of the population, of the community, is "scrupled" under various possible exclusionary standards . . . ; (2) to what extent disqualifying scruples are disproportionately found in certain demographic groups—women, Negroes, laborers, members of particular churches or religious denomination [*sic*], etc. —with the result that death-qualification disproportionately frequently excludes persons in those groups . . . ; (3) to what extent the class of scrupled persons is characterized by common attributes, attitudes and perspectives other than opposition to capital punishment, and so takes on distinctive in-group identity . . . ; (4) to what extent these shared attributes, attitudes, and perspectives include personality factors that dispose scrupled jurors to greater humanity, compassion, impunitiveness and objectivity than the class of death-qualified jurors . . . ; (5) to what extent the common characteristics, which differentiate scrupled and non-scrupled jurors as classes, involve intellectual qualities that dispose scrupled jurors to greater attentiveness, responsibility, and capacity for relevant differentiation, as in the grading of offenses . . . ; (6) to what extent these common characteristics involve attitudes toward crime, courts, corrections and other matters that dispose scrupled jurors to greater impartiality, fairness and rationality in fact-finding and the fixing of penalties . . . .[23]

Since *Witherspoon*, fuller details concerning the pre-*Witherspoon* studies[24] as well as several other studies have been published.[25] Although

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19 The Court refused to take judicial notice of their findings. *Id.* at 517 n.11.

20 *Id.*

21 *Id.*

22 Brief for NAACP Legal Defense and Educational Fund, Inc. and National Office for the Rights of the Indigent as Amicus Curiae at 54, Witherspoon v. Illinois, 391 U.S. 510 (1968).

23 *Id.* at 54-55.

24 *See* note 17 *supra*.

25 *See* Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971) [hereinafter cited as Jurow]; Rokeach

lower courts which have considered the prosecution-proneness issue after *Witherspoon* have been reluctant to recognize these studies,[26] the post-*Witherspoon* findings enlarge the relevant statistical data in several important respects.

In order to assess the impact of the new studies, this Article will examine the data obtained from three of the post-*Witherspoon* studies.[27] The results of the other studies generally corroborate the data presented in this section.[28]

& McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQUESNE L. REV. 125 (1970); Comment, Witherspoon—*Will the Due Process Clause Further Regulate the Imposition of the Death Penalty?*, 1 DUQUESNE L. REV. 414 (1969); 1971 Harris Poll.

26 The response of lower courts to a post-*Witherspoon* assertion that a death-qualified jury is prosecution-prone is exemplified in United States *ex rel.* Townsend v. Twomey, 452 F.2d 350 (7th Cir. 1972), *rev'g* 322 F. Supp. 158 (N.D. Ill. E.D. 1971). In *Townsend*, the district court held a hearing on the prosecution proneness of a death-qualified jury. After hearing testimony on this issue from Professor Zeisel and considering the results of several studies, including the post-*Witherspoon* Bronson study (*see* note 17 *supra*), the lower court found that the adjudication of guilt was constitutionally tainted because it was rendered by a prosecution-prone jury. Completely disregarding the testimony of Professor Zeisel, the court of appeals overruled this finding:

> The Supreme Court in *Witherspoon* concluded that the data contained in these studies "are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." . . .
>
> The court below reached an opposite conclusion based on virtually the same data considered by the Supreme Court in *Witherspoon*. The only new study was the one by Bronson. We do not find this to be sufficient to overcome the determination reached by the Supreme Court that the data are "too tentative and fragmentary" to establish [the defendant's] claim.

452 F.2d at 363 (citation omitted). For other post-*Witherspoon* cases which have summarily rejected the prosecution-proneness argument, see People v. Terry, 2 Cal. 3d 362, 466 P.2d 961, 85 Cal. Rptr. 409 (1970); People v. Brawley, 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161 (1969); *In re* Eli, 71 Cal. 2d 214, 454 P.2d 337, 77 Cal. Rptr. 665, *cert. denied*, 396 U.S. 1020, *rehearing denied*, 397 U.S. 929 (1969); *In re* Arguello, 71 Cal. 2d 13, 452 P.2d 921, 76 Cal. Rptr. 633 (1969); Campbell v. State, 227 So. 2d 873 (Fla. 1969), *cert. dismissed*, 400 U.S. 801 (1970); Zimmer v. State, 206 Kan. 304, 477 P.2d 971 (1971). *But see* State v. Benjamin, 254 La. 49, 222 So. 2d 853 (1969) (exclusion of veniremen in violation of *Witherspoon* denied defendant fair and impartial trial).

27 *See* notes 12, 15 & 25 *supra*. By so limiting the focus, this Article does not imply that a more complete factual picture could not be obtained through use of additional data contained in these and other post-*Witherspoon* studies, or through the use of testimony by the experts who undertook any of the studies. However, it seems plausible to assert that this limited focus will give a reasonably sound indication of the factual picture which could be presented by expert testimony at an evidentiary hearing or judicially noticed by a court on the basis of those results which are or soon will be within the public domain.

The complete results from the 1971 Harris Poll have not yet been made public. The results are in the custody of the NAACP Legal Defense and Educational Fund, 10 Columbus Circle, Suite 2030, New York, N.Y. 10019. The other studies referred to have been released, however, and are therefore subject to judicial notice.

28 *See* note 56 *infra*.

I

SURVEY OF POST-*Witherspoon* STUDIES

A. *The Jurow Study*

In this post-*Witherspoon* experiment,[29] 211 employees of Sperry Rand Corporation were given various tests to determine their attitude toward capital punishment.[30] As part of the tests, the subjects were shown movies of two murder trials, one involving a shooting in the course of a liquor store holdup and the other involving a stabbing which occurred during a rape. The test subjects were asked to state how they would vote with respect to guilt if they were on the jury in each case. Some of the results provide extremely siguificant corroboration of the prosecution-proneness theory.[31] A highly significant statistical relationship existed between a subject's answer on the issue of capital punishment and his determination of guilt or innocence with respect to the liquor store holdup.[32] This relationship provides strong evidence that a positive attitude toward capital punishment increases the likelihood that a juror will favor the prosecution as to the determination of guilt. Perhaps even more siguificant is the finding that, with respect to both mock-trial situations, those people who answered the test questions in a manner which would allow the state to excuse them for cause under *Witherspoon*[33] were far more likely than other people to favor the defendant on the issue of guilt.[34] With respect to the liquor store holdup, 44.7 percent of the people who would not be excluded under *Wither-*

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29 *See* note 25 *supra*.

30 Jurow 577. These tests included a Capital Punishment Attitude Questionnaire (CPAQ (A)) test, which presented a choice of five possible attitudes towards capital punishment, and the CPAQ(B) test, which asked each subject to assume he was on a jury and presented a choice of five possible statements concerning the circumstances under which he would vote for the imposition of capital punishment. These choices included a statement which under *Witherspoon* would be sufficient to authorize a prospective juror's exclusion for cause in a capital case. *Id.* at 577-79. A further test was given to measure the subject's authoritarianism and to elicit his attitude toward the presumption of innocence and the importance of safeguarding constitutional rights. *Id.* at 580, 603-04.

In *Witherspoon*, the Supreme Court repeatedly stated that its holding was not intended to bar a state from seeking to exclude prospective jurors who "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." 391 U.S. at 522 n.21. Question 1 of the CPAQ(B) test was properly designed to identify those people who would be excluded under this exclusionary standard: "I could not vote for the death penalty regardless of the facts and circumstances of the case." Jurow 599.

31 *See* notes 34-38 and accompanying text *infra*.

32 Jurow 582-85.

33 *See* note 30 *supra*.

34 Jurow 588.

spoon would vote to convict, but only 33.3 percent of the people who would be excluded would do so.[35] For the rape-murder, the conviction rate was 60 percent for those who would not be excluded under *Witherspoon* and 42.9 percent for those who would.[36] The results from other tests in the Jurow study showed that a subject's responses to a legal attitude questionnaire provide an extremely reliable indicator of his likelihood to vote for acquittal or conviction in a particular case[37] and that "[t]he more a subject is in favor of capital punishment, the more likely he is to be politically conservative, authoritarian and punitive in assigning penalties upon conviction."[38]

Since the Jurow study appears to be the most carefully analyzed study yet conducted, it is important to discuss the three limitations on the validity of the study's conclusions noted by its author. With regard to the possible criticism that his sample was unrepresentative, Jurow admitted that "[t]he sample was overwhelmingly white, fairly well-educated, and had a high median income."[39] When the subjects of the Jurow study were compared to those selected through sampling techniques used in the Harris Poll, it appeared that the following groups were underrepresented: blacks, women, people with low incomes, people with limited education, and non-Roman Catholics.[40] Significantly, each of the underrepresented groups is substantially more opposed to the death penalty and, according to Harris, less prosecution-prone than the overrepresented groups in the Jurow study.[41] Thus, the sample selected by Jurow would be expected to underestimate significantly the degree to which a typical selection of jurors would be opposed to the death penalty and understate the extent of such jurors' prosecution proneness.

A second limitation of the Jurow study is that the findings reflect

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35 *Id.* at 583.

36 *Id.*

37 *Id.* at 593. Generally, a subject's agreement with a proprosecution statement was assumed to indicate an increased likelihood that he would vote in favor of the prosecution in a mock-trial situation.

38 *Id.* at 588.

39 *Id.* at 577. *But cf. id.* at 596-98.

40 *See* notes 52-53 and accompanying text *infra.*

41 The following is a comparison of the opposition to the death penalty, according to the 1971 Harris Poll, between groups overrepresented in the Jurow sample and those underrepresented: whites—33%, blacks (comprising only 1% of Jurow's sample (Jurow 578))—52%; high school graduates—29%, non-high school graduates (comprising only 6% of Jurow's sample (*id.*))—41%; the median income of the Jurow sample ($12,500 (*id.*))—31%, a median income under $6,000—39%; men—30%, women (comprising only 24% of Jurow's sample (*id.*))—42%; Roman Catholics (comprising almost half the sample (*id.*))—31%; non-Roman Catholics—38%. 1971 Harris Poll 3a.

individual predispositions rather than group interaction. The likelihood that the airing of a different opinion would lead an individual to change his mind with respect to a determination of guilt or innocence was not explored. However, the force of this limitation is mitigated by Professor Hans Zeisel's study, which indicates that when there is a difference of opinion among jurors on the first ballot, the verdict will be rendered in favor of the first ballot majority over ninety percent of the time.[42] This evidence suggests that a juror's original predisposition as to guilt or innocence is of crucial importance in determining the outcome of a trial.

Finally, the most significant problem with this or with any study is that "no experiment can completely simulate a real life situation."[43] Although efforts were made to involve the subjects in the mock trials they were to judge, their awareness that no real consequences would attach to their decisions could be expected to differentiate the experiment sharply from a trial in which members of the jury are presumably cognizant of the extremely significant impact of their decision.[44] This limitation is, of course, inevitable, and must be considered in assessing the legal significance of all studies of the prosecution proneness of death-qualified juries.

B. *The Bronson Study*

In this pre-*Witherspoon* study,[45] published subsequent to *Witherspoon*, a questionnaire was submitted to 1,117 prospective jurors selected from jury lists in several counties of Colorado. In the questionnaire, subjects were asked whether they strongly opposed, opposed, favored, or strongly favored the death penalty. They were then asked to pretend that they were serving on a jury and to indicate their agreement or disagreement with five statements, each of which was designed to indicate a proneness to convict.[46] The results showed a direct, highly

42 H. ZEISEL, *supra* note 17, at 120. Moreover, the 1971 Harris Poll indicates that jurors opposed to capital punishment have a disproportionate tendency to cling to their opinions as to guilt in the face of opposition from other jurors. *See* 1971 Harris Poll 11.

43 Jurow 596 (footnote omitted).

44 *See generally* Orne, *On the Social Psychology of the Psychological Experiment: With Particular Reference to Demand Characteristics and Their Implications*, 17 AM. PSYCHOLOGIST 776 (1962); Rosenthal, *On the Social Psychology of the Psychological Experiments: The Experimenter's Hypothesis as Unintended Determinant of Experimental Results*, 51 AM. SCIENTIST 268 (1963).

45 *See* note 17 *supra*.

46 The five statements used in the experiment were:

1) If the police have arrested an individual and the district attorney has brought him to trial, there is good reason to believe that the man on trial is guilty.

significant statistical relationship between the extent to which a person favors the death penalty and the extent to which he or she will be prone to convict.[47] In addition, the study showed that certain groups are significantly more likely to oppose capital punishment than other segments of the population. Such groups include nonwhites—particularly blacks[48]—women, Jews, Catholics, agnostics, housewives, unskilled workers, those with income of less than $5,000 per year, and Democrats.[49]

The results of Professor Edward Bronson's study strongly confirm Jurow's findings, primarily because a larger sample more clearly reflecting the actual jury population was utilized.[50] The Bronson data also provide substantial evidence that jurors opposed to capital punishment are not spread randomly throughout the population, but are concentrated within certain definable groups.[51]

C. *The Harris Poll*

Selected to reflect an accurate cross-section of the total population, 2,068 people were asked questions designed to elicit their attitudes on both capital punishment and legal issues generally.[52] The subjects were

2) If the person on trial does not testify at his trial, there is good reason to believe that he is concealing guilt.

3) Concerning the high level of violent crime in ghetto areas, this level of violent crime could be reduced if the courts would convict alleged law-breakers more often.

4) The courts are far too technical in protecting the so-called constitutional rights of those involved in criminal activity.

5) The plea of insanity is a loophole allowing too many guilty men to go free. Bronson 7 (footnotes omitted).

47 *Id.* at 8-9. The probability that the two variables measuring conviction proneness and attitude toward the death penalty are associated by chance is less than 1 in 1,000. *Id.* at 8-9 n.35.

48 Whereas 80% of the blacks tested opposed or strongly opposed capital punishment, only 39.7% of the white population did so. *Id.* at 20.

49 *Id.* at 21, 24-25, 27, 30. A possible criticism of this study is that any evaluation of a subject's proneness to convict may be inaccurate because of the uncertainty of the extent to which a person's stated disagreement with a libertarian statement will accurately reflect his vote as a member of a jury in a particular criminal case. However, the force of this criticism is mitigated by Jurow's finding that a subject's profile on a "legal attitude" test, which also purports to test prosecution proneness, will in fact give an extremely accurate indication of a subject's predilection to convict in the mock-trial situation. *See* Jurow 580.

50 Jurow 598. Although the Bronson study was post-*Witherspoon*, the subjects were not expressly tested on whether they could make a statement which would allow their exclusion for cause under the *Witherspoon* standard. *See* Bronson 12.

51 For an elaboration of the elements of a legally recoguized group, see notes 65-90 and accompanying text *infra*.

52 *See* note 12 *supra*.

then shown a set of cards, each containing the facts of a criminal case, and were asked to vote guilty or not guilty on the basis of these facts. Taken together, the results of the attitude questioning and verdict balloting indicated that in every fact situation, subjects who could vote for the death penalty were more likely to convict than those who would never vote for the death penalty (and therefore could be properly excluded under *Witherspoon*).[53] The results from other questions once again demonstrated that people with relatively low scruples against capital punishment share common attitudes which mark them as disproportionately authoritarian, conservative, and punitive.[54]

In addition, the Harris Poll confirmed Bronson's finding that opposition to capital punishment is particularly pronounced in certain segments of the population. Opposition was found to be significantly more prevalent in blacks than whites—52 percent to 33 percent, women than men—42 percent to 30 percent, and non-high school graduates than high school graduates—41 percent to 32 percent.[55]

D. *Legal Questions Raised by the Studies*

These studies indicate that the prosecution-proneness argument is less "tentative and fragmentary" now than it was at the time *Wither-*

53 1971 Harris Poll 3d. Four cases were presented. In the first case, involving the theft of a typewriter, the conviction rate of those potential veniremen who would be subject to exclusion under *Witherspoon* was nine percentage points lower than that of those who would not be subject to exclusion—57% to 66%. *Id.* at 15. In the second and third cases, involving, respectively, manslaughter and the assault of a police officer, the difference between the two groups was seven points—67% to 74%, and 32% to 39%. *Id.* In the fourth case, involving larceny of an automobile, the difference was four points—69% to 73%. *Id.*

54 Particularly instructive are figures comparing the percentage of low and high scrupled jurors—that is, comparing the percentage of those jurors with slight and strong conscientious or religious scruples against capital punishment—who agree with the following statements: (*1*) Courts are contributing to a breakdown in law and order: low scruples—43%, high scruples—18%; (*2*) Blacks are contributing to a breakdown in law and order: low scruples—52%, high scruples—29%; (*3*) The "eye for an eye" approach in criminal procedure is correct: low scruples—61%, high scruples—31%; (*4*) The only language most criminals understand is a good stiff prison sentence: low scruples—66%, high scruples—41%; (*5*) As a juror how much would you trust the prosecutor? A lot: low scruples—36%, high scruples—25%; (*6*) As a juror how much would you trust the arresting police officer? A lot: low scruples—61%, high scruples—48%; (*7*) As a juror how much would you trust the accused? A lot: low scruples—22%, high scruples—34%; (*8*) Defense attorneys are more likely to be dishonest because they're always trying to get criminals off: low scruples—64%, high scruples—40%; (*9*) If a defendant has a past criminal record, chances are he is guilty or he would not be in court: low scruples—38%, high scruples—21%; (*10*) Jurors should ignore the insanity defense because it is a loophole allowing the guilty to go free: low scruples—74%, high scruples—49%; (*11*) If as a juror you had read a newspaper article saying that the defendant had actually committed a crime, although the judge said to ignore it, would you not find him innocent? Yes: low scruples—21%, high scruples—10%. *Id.* at 5-6, 9, 11, 13-14.

55 *Id.* at 3a.

spoon was decided.[56] The new data provide relatively clear and reliable information concerning almost all of the matters which were in need of exploration in 1968. First, the proportion of the population subject to exclusion under the various restrictive jury selection standards is substantial; the most representative sampling suggests that approximately 23 percent of the population would now be excluded under the standard approved in *Witherspoon*,[57] while nearly 36 percent would have been excluded under the previously valid pre-*Witherspoon* state statutes barring those with conscientious scruples against capital punishment.[58] Second, potentially disqualifying scruples are disproportionately high in certain demographic groups, particularly blacks and women.[59] Finally, the people opposed to capital punishment share common attitudes on other legal and social matters, including questions relating to the appropriate role of a juror in a criminal case.[60] It is particularly significant that people who would not be subject to exclusion for their attitudes on capital punishment are more likely than their scrupled counterparts to hold attitudes on the determination of guilt which cast doubt upon their qualification to serve as jurors.[61]

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56 The findings from other studies, both pre-*Witherspoon* and post-*Witherspoon*, generally confirm the conclusions of Jurow, Bronson, and the Harris Poll. *See, e.g.*, H. ZEISEL, *supra* note 17, at 10-17, 24-33 (pre-*Witherspoon* study showing scrupled jurors likely to predominate among blacks, women, persons with low income, and highly-educated persons, and showing from interviews scrupled jurors are more likely than others to vote not guilty on divided first ballot); Goldberg, *supra* note 17, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. at 60-62 (post-*Witherspoon* study showing nonstatistically significant tendency of scrupled jurors to acquit more often than nonscrupled jurors).

57 1971 Harris Poll 3d. Jurow's study indicates that only 10% of the population would be excluded under this test. Jurow 583. This discrepancy may be accounted for by the paucity of black subjects and the overrepresentation of subjects in the Jurow study who were well-educated and had a high median income. *See* note 40 and accompanying text *supra*.

58 The Illinois statute, which was typical of those applied in many states prior to *Witherspoon*, provided that a prospective juror in a capital case could be properly excused for cause if he "state[s] that he has conscientious scruples against capital punishment, or that he is opposed to the same." Law of March 31, 1869, § 4 [1869] Ill. Laws 26th Gen. Assembly 113 (repealed 1963). The 1971 Harris Poll indicates that at least 36% of the population would meet this test. 1971 Harris Poll 3a.

59 *See* 1971 Harris Poll 3c-d; Bronson 21, 24-25, 27, 30.

60 1971 Harris Poll 5-7; Jurow 588.

61 Although veniremen who demonstrate an improper opinion on certain matters pertaining to the trial of a criminal case may be excluded for cause (*see generally* Vance, *Voir Dire Examination of Jurors in Federal Civil Cases*, 8 VILL. L. REV. 76 (1962); Note, *Voir Dire Prevention of Prejudicial Questioning*, 50 MINN. L. REV. 1088 (1966); Comment, *The Jury Voir Dire: Useless Delay or Valuable Technique*, 11 S.D.L. REV. 306 (1966)), a premise of the selection process is that only extreme cases of bias need be subject to a challenge for cause because peremptory challenges enable the parties to remove biased

A selection process which makes an initial selection of only those veniremen biased toward the prosecution is skewed. The disproportionate number of veniremen holding proprosecutorial attitudes reduces the defendant's chance of eliminating these veniremen or of counterbalancing their influence by the inclusion of others who might be more favorable to the defense. Thus, the aforementioned studies indicate that death-qualified juries are prosecution-prone because they are more likely to hold attitudes which are *improperly* slanted against the defendant.

The results of these new studies are sufficiently authoritative to provoke a reconsideration of the question left unresolved in *Witherspoon, i.e.*, whether a verdict of guilty is unconstitutional when imposed by a jury from which either those who expressed conscientious scruples against capital punishment or those who stated they would not impose the death penalty under any circumstances were excluded for cause.

II

Constitutional Right to Trial by an Impartial Jury

In *Witherspoon*, Mr. Justice Stewart suggested that in the absence of a strong governmental interest, a defendant's conviction may be unconstitutional when rendered by a jury which "was less than neutral with respect to *guilt*."[62] Justice Stewart further intimated that competent evidence establishing "that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt"[63] would be sufficient to show that the jury was not constitutionally "neutral." This language, however, was later qualified by a warning that it would be necessary to show "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction."[64] This dictum opens up two lines of constitutional attack for the defendant who wishes to establish a prosecution-proneness claim. He may attempt to show either that the exclusion of jurors opposed to capital punishment results in a constitutionally unrepresentative jury on the issue of guilt or that the exclusion of those jurors substantially increases the risks of

veniremen. *See* Note, *Community Hostility and the Right to an Impartial Jury*, 60 Colum. L. Rev. 349, 357-60 (1960).

62 391 U.S. at 520 n.18 (emphasis in original).

63 *Id.* at 517 (footnote omitted).

64 *Id.* at 518.

conviction. Although these two claims are closely interrelated, it is appropriate to discuss them separately.

A. *The Claim that the Jury Is Unrepresentative as to Guilt*

The claim that the jury is unrepresentative as to guilt may be subdivided into two further arguments. First, the defendant may assert that either the group of people generally opposed to capital punishment or those who would refuse to impose the death penalty under any circumstances, are a legally cognizable group which has been purposely or systematically excluded.[65] If this claim fails, the defendant may argne that the exclusion of either of the aforesaid groups results in an underrepresentation of some other legally cognizable group, such as blacks or women.

1. *The Legally Cognizable Group Argument*

Strauder v. West Virginia[66] was the first case to find that a defendant's constitutional rights were violated when the state systematically excluded a group of citizens from jury service. The Supreme Court held that a black defendant's constitutional rights under the equal protection clause were violated by the application of a state statute which excluded all blacks from jury service. In reaching this result, the Court made it absolutely clear that the constitutional concern was to protect the defendant on trial from the prejudice[67] which would result from the exclusion of potential black jurors.[68] The Court reasoned that the equal protection clause of the fourteenth amendment was designed to eliminate the operation of laws which would exacerbate the prejudice that always exists against certain members of a community. The Court concluded its analysis by noting that

> [i]n view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put on trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial

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[65] This claim may be made regardless of whether prospective jurors were excluded for cause pursuant to a pre-*Witherspoon* or a post-*Witherspoon* test of exclusion.

[66] 100 U.S. 303 (1879).

[67] *Id.* at 308-09.

[68] The Court noted that the exclusion of blacks

> is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice *which is an impediment to securing individuals of the race that equal justice which the law aims to secure to all others.*

Id. at 308 (emphasis added).

> by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.[69]

The holding of *Strauder* is not that white people are so biased against black defendants that they are unfit to serve as jurors, but rather that black jurors, presumably lacking racial bias against black defendants, will be more favorable towards these defendants than white jurors and that therefore blacks constitute a constitutionally cognizable group which may not be systematically excluded from jury service.[70]

In *Hernandez v. Texas*,[71] the Court applied the *Strauder* rule in a situation where jurors were systematically excluded, not on the basis of race, but because of nationality.[72] In *Hernandez*, a Mexican-American defendant convicted of murder claimed that he was deprived of equal protection because the jury which convicted him was selected so as to systematically exclude people of Mexican-American descent. The Court noted that the *Strauder* rule was designed to protect defendants from prejudice which may result from the exclusion of any well-defined group of citizens. In demonstrating that the *Strauder* rule is not limited to cases where a racial group is excluded, the *Hernandez* Court stated:

> [C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.[73]

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69 *Id.* at 309.

70 It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. . . . By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws.

Id; *cf.* Peters v. Kiff, 407 U.S. 493 (1972) (white defendant has standing to bring federal habeas corpus claim challenging systematic exclusion of blacks from grand jury that indicted him and petit jury that convicted him).

71 347 U.S. 475 (1954). In this case, the Court's holding was premised upon the belief that "the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws." *Id.* at 477.

72 *Id.* at 478.

73 *Id.*

In finding that Mexican-American jurors constitute a legally cognizable class, at least with respect to a Mexican-American defendant, the Court relied on evidence relating to "the attitude of the community":

> [T]he testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here").[74]

As in *Strauder*, the Court made no assertion that the dominant group in the community would be so prejudiced against a Mexican-American defendant as to be incapable of serving as a jury. The finding of prejudice in the nonexcluded jurors appeared to be important only to the extent that it demonstrated a difference between the attitude of that part of the community and the group which was systematically excluded. The principle which seems to emerge from *Strauder* and *Hernandez* is that when there is a constitutionally cognizable difference between the attitude of those who are eligible to serve as jurors and those who are (*1*) more favorably disposed towards the defendant and (*2*) systematically excluded, then the exclusion of the latter group deprives the defendant of a constitutional right.[75]

Thus, in determining whether veniremen excluded because of their opposition to capital punishment constitute a legally cognizable class within the *Strauder-Hernandez* rule, two questions are significant. First, is there a constitutionally cognizable difference between the attitude of the veniremen who are eligible to serve and those who are systematically excluded pursuant to either a pre-*Witherspoon* or a post-*Witherspoon*[76] exclusionary test? If so, is the situation distinguish-

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[74] *Id.* at 479-80 (footnote omitted).

[75] In *Hernandez* and *Strauder*, the Court held that the exclusion of a legally cognizable group of citizens deprived the defendant of his rights under the equal protection clause. However, later cases suggest that when a legally cognizable group is excluded, the defendant is also deprived of his constitutional right to a trial before a jury representing a cross-section of the community. *See* text accompanying notes 82-86 *infra*. Both cases may be distinguished from the present situation on the ground that the rules effected in the former cases were designed to protect defendants belonging to specific minority groups. *But see* notes 80-89 and accompanying text *infra*.

[76] Hereinafter, "post-*Witherspoon* test" will denote a test which excludes veniremen opposed to capital punishment but which is not constitutionally impermissible under the

able from *Hernandez* and *Strauder* because the defendants involved do not belong to any specific minority group?

Hernandez demonstrates that the first question must be answered on the basis of the "attitude of the community," which requires a comparison of the attitudes of the excluded and nonexcluded group. In the present comparison between death-qualified juries and the class of people excluded from such juries, as in *Hernandez*, evidence from several sources points toward a difference in attitudes on the part of the two groups. For example, death-qualified jurors are more likely to distrust defendants and to trust the prosecution;[77] they are more likely to hold attitudes on the determination of guilt which reflect antipathy toward constitutional protections afforded the accused;[78] and when faced with any kind of a simulated trial situation, they are significantly more likely to render a guilty verdict.[79] Again, as in *Hernandez*, the cumulative effect of this data strengthens its impact. Thus, the results from the studies demonstrate a constitutionally cognizable difference in attitude between the two groups of veniremen.

With respect to the argument that *Hernandez* and *Strauder* are distinguishable from the present analysis because of their emphasis on national origin and race, the Supreme Court's holding in *Witherspoon* and its dictum in that case and in *Glasser v. United States*[80] demonstrate that a legally cognizable group may be defined solely in terms of one's expression or exposure to particular points of view.[81] The *Witherspoon* Court maintained that in penalty determinations, the exclusion of all veniremen who express opposition to capital punishment results in a jury which falls "woefully short of that impartiality to which the peti-

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Court's holding in *Witherspoon*. It should be noted, however, that even after *Witherspoon*, several states continued to allow the exclusion of veniremen under tests which are clearly impermissible under the Supreme Court's holding in that case. *See* note 5 *supra*.

77 *See* 1971 Harris Poll 6, 8; *cf.* Bronson 15; Jurow 571.

78 *See* text accompanying note 54 *supra*.

79 *See* text accompanying notes 33-35 & 53 *supra*. The actual significance of the studies' findings with respect to the increased tendency on the part of excluded veniremen to acquit in simulated trials is more fully discussed below. *See* notes 126-30 and accompanying text *infra*.

80 315 U.S. 60 (1942).

81 Lower court cases have suggested that the exclusion of prospective jurors with well-defined attitudes or beliefs is enough to deny the defendant's constitutional right to a representative jury even in the absence of any showing that the defendant was prejudiced by the exclusion. *See* United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970) (dictum); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (Maryland's constitutional exclusion from jury service of individuals who do not believe in Supreme Being violated fourteenth amendment of Federal Constitution even when applied to defendant who believes in Supreme Being). *See generally* Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919 (1965).

tioner was entitled under the Sixth and Fourteenth Amendments."[82] Thus, the Court defined a legally cognizable class on the basis of the excluded venireman's expressed attitude. Moreover, *Witherspoon*'s dictum concerning the defendant's right to a jury representing a cross-section of the community seems to apply with equal force to the determination of guilt.[83] In *Glasser*, cited with approval in *Witherspoon*,[84] the Court commented that if the jury was selected by a process which allowed on the jury only members of the Illinois League of Women Voters, who had attended " 'jury classes whose lecturers presented the views of the prosecution,' "[85] then the defendant's constitutional rights to trial by an impartial jury would have been violated.[86] It follows that a group's tendency to express or demonstrate attitudes relating directly to a juror's function is a perfectly appropriate index for determining whether the group is legally cognizable within the definitions of *Strauder* and *Hernandez*.[87] Therefore, the finding that the exclusion of veniremen based upon their views on capital punishment pursuant to either a pre-*Witherspoon* or a post-*Witherspoon* test results in the selection of jurors who are substantially more likely to be biased in favor of the prosecution[88] is sufficient to establish that the application of either test results in the exclusion of a legally cognizable group.[89]

2. *The Underrepresentation Argument*

The results of the previously mentioned studies demonstrate that the exclusion of veniremen opposed to capital punishment results in

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82 391 U.S. at 518 (citations omitted).

83 *See* note 63 and accompanying text *supra*.

84 391 U.S. at 518.

85 Glasser v.. United States, 315 U.S. 60, 84 (1942).

86 *Id.* at 87. Although *Glasser* was a federal case, the Court discussed principles which are mandated by the sixth amendment guarantee of trial by an impartial jury, rather than the Court's supervisory control over federal trials. *See, e.g., id.* at 84-85.

87 In view of this analysis, the defendant's nonmembership in the excluded class should not be relevant. The holdings in *Hernandez* and *Strauder* were limited to defendants belonging to the excluded class because a constitutionally cognizable difference in attitude between the eligible and excluded veniremen could be found only with respect to defendants belonging to that class. In general, however, there appears to be a trend toward completely abandoning the requirement that a defendant must be a member of the excluded class. *See, e.g.*, Peters v. Kiff, 407 U.S. 493, 504 (1972) (white defendant has standing to challenge systematic exclusion of black veniremen); State v. Madison, 240 Md. 265, 268, 213 A.2d 880, 882 (1965) (any defendant has standing to challenge systematic exclusion of nonbelievers). *But see* Fay v. New York, 332 U.S. 261, 287 (1947) (dictum) (refusal to rule on issue of defendant's identity with excluded group). *See generally* Note, *supra* note 81.

88 *See* text accompanying notes 36-37, 46-47 & 53 *supra*.

89 *See* text accompanying notes 33-35 & 53 *supra*.

a clear underrepresentation of the following groups: blacks, women, those with less than a high school education, and people with certain religious beliefs, especially Jews and agnostics.[90] Since all of these groups have already been judicially recognized as legally cognizable in certain circumstances,[91] an independent attack on the practice of seeking a death-qualified jury may be premised on the claim that the resulting underrepresentation of any one (or all) of these legally cognizable groups is unconstitutional.[92]

The claim that the exclusion of veniremen opposed to capital punishment results in an underrepresentation of black jurors is particularly compelling. The studies universally demonstrate that the operation of either a pre-*Witherspoon* or a post-*Witherspoon* exclusionary test results in a substantially disproportionate elimination of black citizens. Thus, under Bronson's fignres, application of a pre-*Witherspoon* exclusionary test results in the exclusion of 80 percent of all blacks, but only about 40 percent of all whites.[93] The results of the Harris Poll indicate that application of a pre-*Witherspoon* test results in the exclusion of 52 percent of all blacks and 33 percent of all whites, and operation of the post-*Witherspoon* test leads to the exclusion of 35 percent of all blacks and only 21 percent of all whites.[94] If a state were to adopt a system under which this percentage of black and white citizens was automatically excluded, such a system would be clearly unconstitutional. *Strauder*'s prohibition of the systematic exclusion of black veniremen[95] is equally applicable whether all or only a proportion of black citizens are systematically excluded because blacks would be "singled out and expressly denied by a statute all right to participate . . . as jurors."[96]

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90 *See* Bronson 15-30; 1971 Harris Poll 3c.

91 *See* Peters v. Kiff, 407 U.S. 493 (1972) (blacks); Ballard v. United States, 329 U.S. 187 (1946) (women); Labat v. Bennet, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967) (daily wage earners and blacks); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (nonbelievers).

92 For a discussion of which defendants have standing to raise claims of this type, see note 87 *supra*.

93 *See* note 48 and accompanying text *supra*.

94 1971 Harris Poll 3a, 3d. Of course, the studies' demonstration that the exclusion of veniremen opposed to capital punishment results in the underrepresentation of certain groups generally does not prove that such underrepresentation necessarily occurred in any particular area at any particular time. However, since presenting precise evidence relating to these matters is more apt to be within the control of the prosecution, the studies should suffice at least to shift to the prosecution the burden of showing that in his particular location the exclusion of those opposed to capital punishment did not result in a substantial underrepresentation of one or more of the relevant groups.

95 100 U.S. at 308-09.

96 *Id.* at 308; *cf.* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (fixing of city boundaries

The prosecution will undoubtedly argue that blacks are not "systematically excluded" by a jury selection process which eliminates those persons opposed to capital punishment. Such an argument would construe *Strauder* as not prohibiting the exclusion of large numbers of black citizens from jury service if such an exclusion was merely the incidental result of a state policy on the question of capital punishment.

This argnment fails to recognize that a black citizen's stand on the question of capital puninshment is intimately associated with his blackness. Blacks are disproportionately opposed to capital punishment because over the years a disproportionate number of blacks have been executed.[97] Therefore, because of the relationship between a black venireman's beliefs and his blackness, the exclusion from juries of large numbers of blacks who oppose capital punishment becomes a systematic racial exclusion.[98]

This does not mean that any black excluded from a jury is being excluded on racial grounds. A distinction should be made between a selection process which leads to an initial underrepresentation of black veniremen, and one which allows the direct exclusion of a disproportionate number of apparently qualified potential black jurors.[99]

Within limits, it is plausible to accept the former situation as an unavoidable by-product of the state's choice of a selection process.[100] In the latter case, however, the apparent lack of necessity for excluding qualified veniremen makes it appropriate to find that the resulting

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to exclude blacks from voting in municipal elections violative of fourteenth amendment due process and equal protection clauses and fifteenth amendment).

97 *See, e.g.*, Bedau, *Capital Punishment in Oregon, 1903-64*, 45 ORE. L. REV. 1, 10-12 (1965); Williams, *The Death Penalty and the Negro*, 67 THE CRISIS 501 (1960).

98 *See* A. KOESTLER, REFLECTIONS ON HANGING 167 (1956), *cited in* Witherspoon v. Illinois, 391 U.S. 510, 520 n.17 (1967).

99 *See, e.g.*, Brown v. Allen, 344 U.S. 443, 467-74 (1953) (jury selection system from tax lists, resulting in underrepresentation of blacks because of their lower economic status, held valid); United States v. Ditommaso, 405 F.2d 385, 391-92 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969) (selection system resulting in underrepresentation of women, young persons, and those less educated held valid when unintentional and unsystematic); Christian v. Maine, 404 F.2d 205, 206 (1st Cir. 1968) (no constitutional requirement for statistically proportionate representation of various groups as long as no showing that jury "was drawn from an artificially limited base, or in a discriminatory manner").

100 The limits of the Court's constitutional tolerance for such a system is sketched in Sims v. Georgia, 389 U.S. 404 (1967). In *Sims*, jury lists were drawn from county tax digests which separately listed taxpayers by race. Blacks comprised 24.4% of the individual taxpayers, but constituted only 9.8% of the traverse jury list. The Court held that this method of selection did not comply with constitutional requirements. *Id.* at 407-08. If Bronson's figures are accepted (Bronson 18-20) in a case where all veniremen opposed to capital punishment are excluded for cause, the resulting underrepresentation of blacks will be of a magnitude equal to the discrepancy condemned in *Sims*.

significant underrepresentation of blacks constitutes a systematic exclusion unless the state can justify its exclusionary policy.

In *Labat v. Bennet*,[101] the Fifth Circuit apparently utilized this approach in holding that the exclusion of daily wage earners from jury service constitutes racial discrimination because the excluded class contains a disproportionately large number of blacks.[102] The court did not say that the exclusion of laborers was designed to exclude blacks, but rather applied a three-fold test which emphasized the justification for the exclusionary rule, the number of blacks excluded, and the state's efforts to remedy the resulting underrepresentation. The court did not discredit the state's assertion that the exclusionary rule was benignly designed to exclude those who would lose their daily wages if called to jury service. But the court weighed this assertion and found that "[a] benign and theoretically neutral principle loses its aura of sanctity when it fails to function neutrally."[103] Finding that the system failed to function neutrally, the court noted that the exclusionary practice excluded a disproportionate number of blacks (forty-seven percent of the entire black working force) and emphasized that the state had made no effort to correct the resulting racial imbalance.[104] On the basis of these findings, the court concluded that the selection process was legally invalid as a systematic exclusion of blacks.[105]

The *Labat* test yields a similar result when applied to the exclusion of veniremen opposed to capital punishment. Although the exclusionary tests on their face do not discriminate against blacks, their operation will lead to a constitutionally impermissible exclusion if it can be demonstrated that a substantial disproportion of blacks are excluded and that no corrective measures are taken to rectify the resulting underinclusion. The studies demonstrate that the exclusion of veniremen opposed to capital punishment constitutes an exclusion of large numbers of blacks on a level comparable to that condemned in *Labat*. Of course, the state should have the opportunity to show either that in a particular location, application of the exclusionary test did not result in a substantially disproportionate exclusion of blacks,[106] or that

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101 365 F.2d 698 (5th Cir. 1966).

102 *Id.* at 720. The court noted that the systematic exclusion of wage earners was in itself an unconstitutional exclusion of a legally cognizable class. *Id.* at 719-20.

103 *Id.* at 724.

104 *Id.* at 725.

105 The Court stated that the facts "give rise to an inference of 'purposeful discrimination' on the part of the jury selection officials, within the legal sense of those words." *Id.* at 726.

106 *See* note 94 *supra*.

corrective measures were taken to correct any racial imbalance. When the state fails to meet this burden, however, a jury selection system which excuses black veniremen because of their opposition to capital punishment should be held unconstitutional as a systematic underrepresentation of black jurors in violation of the equal protection clause of the fourteenth amendment.[107]

When the defendant is a woman, a Jew, an agnostic, or relatively uneducated, the claim that the exclusionary rule results in an underrepresentation of blacks[108] may be buttressed by the argument that in obtaining a death-qualified jury the state has also created an underrepresentation of an additional legally cognizable group, usually the group of which the defendant is a member.[109] The cumulative impact of these arguments serves to strengthen and reinforce the claim that the systematic exclusion of those opposed to capital punishment results in a constitutionally impermissible tendency toward the selection of an unrepresentative jury.[110]

B. *The Claim that the Defendant's Risks of Conviction Are Substantially Increased*

The question arises as to whether the results from the post-*Witherspoon* studies demonstrate that the jury selection process utilized in capital offense cases results in a sufficiently substantial increase in the risk of conviction to establish a constitutional claim. Jurow's study shows that in a mock trial the number of venireman voting for conviction rises by as much as five percent[111] if a pre-*Witherspoon* exclu-

107 *Cf.* Hill v. Texas, 316 U.S. 400, 404 (1942) (citations omitted): "[The jury commissioners] failed to perform their constitutional duty . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds."

108 In view of the Court's ruling in Peters v. Kiff, 407 U.S. 493 (1972), any defendant may establish a constitutional claim by showing a significant underrepresentation of black citizens on his jury. On the other hand, when the exclusion of other legally cognizable groups such as women (*see* Ballard v. U.S., 329 U.S. 187 (1946)), is at issue it is possible that the defendant will have to show that he or she is a member of the class which is allegedly underrepresented. *But see* note 87 *supra.*

109 *See* 1971 Harris Poll 3a. The extent of the underrepresentation of these other groups in a death-qualified system can be determined by using the Harris and Bronson figures on a random sample of 100 jurors. For example, the percentage of women in the venire would be reduced from 50% to approximately 42% under a pre-*Witherspoon* exclusion according to Harris's and Bronson's figures. *See* Bronson 22; 1971 Harris Poll 3a. Using a post-*Witherspoon* test would result in a reduction of women from 50% to 47%. *See* 1971 Harris Poll 3a.

110 *Cf.* Glasser v. United States, 315 U.S. 60, 85-86 (1942).

111 The conviction rate rose from 43.6% to 48.6% with respect to the liquor store holdup. With respect to the rape-murder, exclusion of those people opposed to capital punishment causes the conviction rate to rise from 58.3% to 60.0%. Jurow 583.

sionary text is applied,[112] and by more than one percent[113] if a post-*Witherspoon* exclusionary test is applied.[114] Since the Court in *Witherspoon* implied that it would consider results from carefully documented scientific studies,[115] Jurow's figures should be accepted as a relatively conservative[116] indication of the extent to which either exclusionary test would increase the percentage of chosen veniremen who would vote for conviction.

The constitutional effect of a one percent increase in the number of eligible veniremen who would vote to convict will not be to increase every defendant's chances of conviction by a slight amount, but rather will be to magnify the danger of conviction for a few defendants very siguificantly, while leaving the great majority of defendants unaffected. Thus, if one out of one hundred prospective jurors is prosecution-prone because of the operation of the exclusionary test, a jury of twelve containing that one juror would be selected approximately thirteen percent of the time,[117] and a jury of six containing that juror would be selected slightly in excess of six percent of the time.[118] On those occasions in which an additional prosecution-prone juror would be placed on a jury of either six or twelve, the defendant's chances of acquittal would be significantly diminished because the change of a single juror's vote on the first ballot may have an enormous impact on the question of whether a defendant will be convicted or acquitted.[119]

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112 A pre-*Witherspoon* exclusionary test would presumably exclude those subjects who stated that they were either opposed to capital punishment under any circumstances or opposed to it in all but a few cases. *See generally* Comment, *supra* note 5.

113 With respect to the rape-murder, the removal of those people who would be excluded under a post-*Witherspoon* test caused the conviction rate to increase from 58.3% to 60.0%. Jurow 583.

114 A post-*Witherspoon* test would presumably exclude those subjects who stated that if they were selected they "could not vote for the death penalty regardless of the facts and circumstances of the case." Witherspoon v. Illinois, 391 U.S. 510, 520 (1967).

115 *See* notes 10-13 and accompanying text *supra.*

116 The sample selected by Jurow is likely to understate the proportion of people who are opposed to capital punishment. *See* notes 39-41 and accompanying text *supra.*

117 This figure is obtained by adding the sum of the chances of choosing the prosecution-prone juror in each of 12 random selections, keeping in mind that the population decreases by one with each selection. Thus the sum of 1/100, 1/99 . . . 1/90, 1/89 equals 12.7%.

118 By the same process, the sum of 1/100 . . . 1/95 equals 6.15%.

119 When a juror's vote is changed so that instead of one vote for acquittal, there is a unanimous vote for conviction, the significance of the addition of a single prosecution-prone juror is obvious. *See* Marion v. Beto, 434 F.2d 29, 32 (5th Cir. 1970) (footnote omitted):

> Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant. Although a defendant certainly has no

Although Mr. Justice Stewart gave no definitive exposition of what constitutes a substantial increase in the risk of conviction, the *Witherspoon* Court's reliance on *Glasser v. United States*[120] suggests that a showing of any perceptible bias in favor of the prosecution will suffice to prove a constitutional violation. Moreover, *Witherspoon* itself implies that a method of jury selection that substantially increases the risks of conviction as to *some* defendants is sufficient to establish a constitutional claim.

In addition to disapproving a process of selecting jurors from a group which had been exposed to proprosecution views,[121] *Glasser* emphasized that

> [t]endencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.[122]

Implicit in this principle, which was approved in *Witherspoon*,[123] is a recognition that the defendant's right to trial before an impartial jury selected from a cross-section of the community involves something more than a mere ban on the systematic exclusion of legally cognizable groups. To have a jury which is "truly representative of the community,"[124] the defendant must be given the luck of the draw; he must have the same opportunity as the prosecution to select members of the

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assurance that a properly-empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case.

Moreover, when the jurors are split on the first ballot, a switch of a single vote on that ballot may be of crucial significance. One study found that in more than 90% of the cases, when there is a disagreement among members of the jury on the first ballot, judgment will be rendered in favor of the side of the largest vote on the initial ballot. *See* H. ZEISEL, *supra* note 17, at 24-32.

The importance of each individual juror's vote is obviously heightened by the recent Supreme Court decisions holding that state jury verdicts need not be unanimous (*see* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972)), and may be rendered by a jury composed of as few as six members. *See* Williams v. Florida, 399 U.S. 78 (1970). These decisions make it possible for jury verdicts to be rendered by a vote of 9-3 (*see* Johnson v. Louisiana, *supra*) or perhaps even by a vote of 4-2. *But see id.* at 366 (Blackmun, J., concurring). Thus, when the presence of an additional prosecution-prone juror leads to the difference between a 6-6 or a 3-3 tie and a 7-5 or a 4-2 vote for conviction, the effect of the *Witherspoon* exclusionary test on that particular defendant is likely to be crucial.

120 315 U.S. 60, 80-84 (1942).

121 *See* notes 85-86 and accompanying text *supra*.

122 315 U.S. at 86.

123 391 U.S. at 518.

124 Smith v. Texas, 311 U.S. 128, 130 (1940) (dictum).

community who will view his case in a relatively favorable light.[125] Although each defendant must take his chances with respect to the way in which the "luck of the draw" operates in his case, a jury selection process which is skewed so that no defendant will have an equal "luck of the draw" is unconstitutional.

Given this principle, the studies indicate that the exclusion of veniremen pursuant to either a pre-*Witherspoon* or a post-*Witherspoon* exclusionary test results in the selection of jurors who, when compared to jurors representing an accurate cross-section of the community, are not only statistically more prone to convict when participating in simulated trials,[126] but are also significantly more likely to express views which evidence a constitutionally impermissible bias[127] in favor of the prosecution.

Moreover, *Witherspoon* held that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[128]

As the Fifth Circuit recognized in *Marion v. Beto*,[129] the implication of this holding is that the improper exclusion of even a single veniremen will be grounds for invalidating the imposition of a sentence of death:

> Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community.[130]

If the defendant's constitutional right to a fair penalty determination is prejudiced by the exclusion of even a single veniremen who will state that he is generally opposed to capital punishment, it must follow that as to the determination of gnilt, the replacement of even a single venireman who will vote for an acquittal in a doubtful case with one who will vote to convict constitutes a sufficient increase in the defen-

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125 The basis for this rule is undoubtedly a concern for preserving the legitimacy of jury verdicts. Jury verdicts rendered by jurors selected by excluding that segment of the community which is likely to favor the defendant cannot represent the judgment of the community.

126 *See* notes 33-35 and accompanying text *supra*.

127 *See* notes 33-35 and accompanying text *supra*.

128 391 U.S. at 522 (footnote omitted).

129 434 F.2d 29 (5th Cir. 1971).

130 *Id.* at 32.

dant's risk of conviction to establish the constitutional claim. Thus, Jurow's study demonstrates that the exclusion of veniremen pursuant to either a pre-*Witherspoon* or a post-*Witherspoon* exclusionary test results in a constitutionally impermissible increase in the defendant's risks of conviction.

III

THE EQUAL PROTECTION CLAIM

Since defendants in capital cases only are subject to the prejudice which accrues as a result of the exclusion for cause of veniremen opposed to capital punishment, invocation of the equal protection clause will add a new dimension to the arguments previously developed. A defendant convicted by a death-qualified jury may argue that his rights under the equal protection clause are violated, because whereas defendants in non-capital cases are subject to one process of jury selection, the state, without any justifiable basis, has subjected the class of defendants to which he belongs to a different and prejudicial process of jury selection.[131]

In *Fay v. New York*[132] the Supreme Court gave extensive consideration to a claim of this nature. At issue in *Fay* was the constitutionality of a New York procedure subjecting certain defendants to trial before a so-called "blue-ribbon" jury. Although most defendants were tried before jurors selected from a general panel, upon application of either adversary, New York trial judges had discretion to require that any particular civil or criminal case be tried before a special jury,[133] consisting

131 This equal protection analysis is analogous to that which would be applied in determining whether a fundamental constitutional right should be protected under the due process clause. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting). The protection afforded fundamental rights under the equal protection clause, however, is clearly broader than that afforded such rights under the due process clause. *See* Stanley v. Illinois, 405 U.S. 645, 658 n.10 (1972). For example, although the due process clause does not require a state to provide a criminal defendant a right of appeal, the equal protection clause does require that when the state provides an appeal for some, it cannot deny it to others because of their inability to pay, even if such a denial may be rationally defended on other grounds. *See* Douglas v. California, 372 U.S. 353, 353-58 (1963). *See generally* Dunham v. Pulsifer, 312 F. Supp. 411, 417 (D. Vt. 1970) (dictum); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1130 (1969).

132 332 U.S. 261 (1947).

133 *Id.* at 268-69. Pursuant to the relevant statute (Law of April 7, 1938, ch. 552, § 749-aa(4), [1938] N.Y. Laws 18-b (repealed 1965)), the trial court's discretion was to be exercised only upon a showing that

> by reason of the importance or intricacy of the case, a special jury is required,

of people selected from the general panel with the exclusion of four categories of veniremen.[134] Two defendants subjected to trial by jurors selected from this special panel claimed that they were denied equal protection because statistics showed that jurors selected from the special panel were more likely to convict than jurors selected from the general panel. To support this claim, the defendants relied on studies compiled by the New York State Judicial Council which showed that in certain types of homicide cases, it appeared that "in 1933 and 1934, special juries convicted in eighty-three percent and eighty-two percent of the cases while ordinary juries those years convicted in forty-three percent and thirty-seven percent respectively."[135] The Court rejected the evidence gleaned from these figures because it had never been suggested that any of the special jury convictions were unwarranted[136] and on grounds of staleness:

> These defendants were convicted March 15, 1945, when the statistics offered here as to relative propensity of the two juries to convict were more than ten years old, and when the conditions which may have produced the discrepancy in ratio of convictions had long since been corrected.[137]

However, the Court intimated that, absent the problem of staleness, the evidence from the studies might have been sufficient to establish a violation of the equal protection clause:

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or . . . the issue to be tried has been so widely commented upon . . . that an ordinary jury cannot without delay and difficulty be obtained . . . or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury.

332 U.S. at 268-69 (footnote omitted).

134 332 U.S. at 267-68. The categories of excluded veniremen were as follows:

No person shall be selected as such special juror who is by law disqualified or exempt from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

Law of April 7, 1938, ch. 552, § 749-aa(2), [1938] N.Y. Laws 18-b (repealed 1965).

135 332 U.S. at 279.

136 *Id.* at 280.

137 *Id.* at 281.

> If it were proved [*sic*] that in 1945 an inequality between the special jury's record of convictions and that of the ordinary jury continued as it was found by the Judicial Council to have prevailed in 1933-34, some foundation would be laid for a claim of unequal treatment. No defendant has a right to escape an existing mechanism of trial merely on the ground that some other could be devised which would give him a better chance of acquittal. But in this case an alternative system actually was provided by the state to other defendants. . . . [A] discretion, even if vested in the court, *to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be "equal protection of the laws."*[138]

The Court emphasized the need to adhere to a system which would not "lessen [a defendant's] chances" of conviction. This statement implies a recognition by the *Fay* majority that whenever the defendant presents statistical evidence that a dual system of jury selection leads to an increased probability of conviction for the class of people to which the defendant belongs, the defendant's conviction will constitute a violation of equal protection unless the state can show either that the dual system of jury selection does not in fact lead to an increased probability of conviction for one class of defendants,[139] or that the disparity in conviction rates is justified by a substantial state interest.[140]

In several recent cases the Supreme Court has reiterated the principle that when a state's classifications threaten fundamental personal rights, the equal protection clause requires a compelling state interest, and the lines denoting such classifications are subject to the most rigid scrutiny.[141] Since the right to a fair trial constitutes a fundamental personal right,[142] a showing that a state's dual system of jury selection

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138 *Id.* at 285 (emphasis added).

139 A number of explanations, other than the different processes of jury selection, might explain the difference in conviction rates. For example, the variation might be attributed to the differences in the cases selected for examination or to the fact that the prosecutor prepared more extensively for special jury trials. *Id.* at 286.

140 Although the Court in *Fay* noted a state interest in providing administrative procedures which could expedite the selection of jurors in certain trials (*id.* at 271), the Court's analysis suggested that this interest would not be sufficient to justify a classification which substantially increased the chances of conviction for one group of defendants. *Id.*; *see* text accompanying note 138 *supra*.

141 *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (right of unacknowledged illegitimate children to collect workmen's compensation death benefits); Stanley v. Illinois, 405 U.S. 645 (1972) (right of unwed fathers to custody of illegitimate children upon mother's death); Cipriano v. City of Houma, 395 U.S. 701 (1969) (right of nonproperty taxpayer to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Griffin v. Illinois, 351 U.S. 12 (1956) (right to free transcript for pnrpose of appeal); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate).

142 *See* Witherspoon v. Illinois, 391 U.S. 510, 518 (1967).

constitutes a classification which threatens this right should be sufficient to invoke the compelling interest test.

Several recent cases seem to indicate that the dual system does establish an impermissible classification. In *Jackson v. Indiana*,[143] the Court held that the use of different commitment and release procedures for those charged with a criminal offense than were used for those who were civilly committed as mentally incompetent constituted a denial of equal protection.[144] The Court emphatically asserted that with respect to those individuals charged with a criminal offense the diminution of procedural safeguards constituted an unconstitutional classification:

> [W]e hold that by subjecting [the defendant] to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, . . . Indiana deprived [him] of equal protection of the laws under the Fourteenth Amendment.[145]

Jackson's suggestion that a violation of the equal protection clause will occur whenever the presence of a dual system potentially prejudices one group of defendants is confirmed by holdings in other recent cases. In *Douglas v. California*,[146] the Court struck down a California procedure for the appointment of counsel which distinguished between indigent defendants and those who could afford counsel on appeal.[147] The *Douglas* Court made no finding that indigent defendants were in fact prejudiced by the procedure. Rather, the Court merely found that the *potential* for prejudice created an invidious classification which "[did] not comport with fair procedure."[148]

In the present discussion of convictions rendered by death-quali-

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143 406 U.S. 715 (1972).

144 *Id.* at 723-30.

145 *Id.* at 730.

146 372 U.S. 353 (1963).

147 The California procedure provided that the state would appoint counsel for the indigent defendant upon request only if the California District Court of Appeal's preliminary examination of the record showed that the appointment of counsel would be advantageous to the defendant or helpful to the court. *Id.* at 355.

148 *Id.* at 357. The prejudice resulted from a requirement that one class of defendants make a preliminary showing of merit before counsel would be appointed. *Cf.* Stanley v. Illinois, 405 U.S. 645, 658 n.10 (1972) (predicating "finding of constitutional invalidity under the Equal Protection Clause . . . on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated"); Bower v. Vaughn, 313 F. Supp. 37, 42 (D. Ariz.), *aff'd mem.*, 400 U.S. 884 (1970) (applying *Stanley* rationale to invalidate state hospital superintendent's discretionary authority to return patients to their state of former residence even though such authority "exercised benevolently in the best interests of the patient").

fied juries, the state's dual system of jury selection infringes on one group of citizens' constitutional right to jury trial by denying the citizens within that group the right to include as members of the jury those people opposed to capital punishment.[149] Under the Court's equal protection cases, it would appear that, absent a compelling state interest, the exclusion of this group of prospective jurors as to one class of defendants will operate as an invidious classification. This is especially true in light of studies which demonstrate that the exclusion of jurors pursuant to either a pre-*Witherspoon* or a post-*Witherspoon* test creates a statistically significant potential for prejudice.[150]

The interest of the state in seeking the death penalty is the only possible justification for the exclusion of veniremen opposed to capital punishment. *Furman* clearly indicates, however, that this interest is illusory.[151] Therefore, there is no compelling state interest which can justify the invidious classification which occurs as a result of a state's dual system of jury selection. Accordingly, the conviction of a defendant by a jury which excluded any group of veniremen for cause because of their opposition to capital punishment is invalid under the equal protection clause of the fourteenth amendment.

IV

RETROACTIVITY: REVERSING CONVICTIONS BY DEATH-QUALIFIED JURIES

The remaining question concerns the extent to which a constitutional ruling invalidating a conviction by a death-qualified jury can be retroactively applied. Since *Furman* appears to prohibit the imposition of a death sentence under any statute currently in effect, a merely prospective ruling invalidating convictions obtained pursuant to a system of jury selection previously employed in capital cases might be expected to have a relatively minor impact.[152] On the other hand, a retroactive

149 *See* notes 37 & 54 and accompanying text *supra.*

150 *See* text accompanying notes 33-35 & 53 *supra.*

151 Since *Furman* held that death sentences obtained pursuant to discretionary capital offense statutes were unconstitutional, a state's interest in obtaining such sentences is illusory.

152 Despite the ruling in *Furman*, prosecutors in several cases have sought and obtained the death penalty under statutes imposing discretionary power in the jury. Thus, even a prospective ruling on the prosecution-proneness issue might play a critical part in future cases by deterring prosecutors from attempts of this kind, affecting the type of jury selection process employed in these cases, or invalidating convictions obtained. Similarly, if death sentences were sought to be obtained pursuant to statutes imposing mandatory capital punishment, a ruling on the prosecution-proneness issue would have important consequences. However, in this situation the issue arises in a different context because the

holding would have an enormous impact, invalidating not only the convictions of most of the 631 defendants who were previously under sentence of death but also a much larger number of convictions in which the prosecution unsuccessfully sought the death penalty.[153] While analysis of the problem of retroactive application depends to some extent on the constitutional doctrine utilized to invalidate convictions rendered by a death-qualified jury, ultimately the problem can only be resolved by weighing both the interests of the defendants convicted by death-qualified juries and the interests of the state in law enforcement.

A. *The Question of Whether Invalidating Convictions Imposed by a Death-Qualified Jury Constitutes a "New Decision"*

Unless a decision invalidating convictions rendered by a death-qualified jury is based upon new constitutional doctrine, the decision must be applied retroactively. While in the past decade the Court has not hesitated to hold that newly announced constitutional decisions may be applied prospectively,[154] no case has ever suggested that a new application of an established constitutional principle should not be given retroactive effect. The doctrine of stare decisis requires that the law develop incrementally by adhering to and expanding upon precedent.[155] If a decision were conceived as establishing a new rule of law whenever an established constitutional principle is applied to a new factual situation, each decision would have precedential value only with respect to cases containing identical facts.

Although the Supreme Court has never explicitly discussed the issue of retroactivity of a new application of established constitutional

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state could argue that *its* interest in obtaining a fair trial should give it the right to exclude jurors whose opposition to capital punishment renders them incapable of returning a guilty verdict with a mandatory death sentence. *See* note 16 *supra.*

153 Although it is impossible to accurately estimate the number of defendants now in prison who have been convicted by death-qualified juries, the number is undoubtedly in the thousands. For example, in 1970, the nationwide estimate of the number of murder and nonnegligent manslaughter convictions was 16,000 and the estimate of nationwide forcible rape convictions was 38,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1972, at 140 (1972). Even allowing for the fact that the majority of these convictions were probably entered pursuant to a guilty plea, the number of such convictions rendered by death-qualified juries is still substantial.

154 *See, e.g.*, Williams v. United States, 401 U.S. 646 (1971) (prospective application of Chimel v. California, 395 U.S. 752 (1969), which narrowed permissible scope of searches incident to arrest); Johnson v. New Jersey, 384 U.S. 719 (1966) (prospective application of Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964), which established new protections for defendants involved in pretrial interrogation); Linkletter v. Walker, 381 U.S. 618 (1965) (prospective application of Mapp v. Ohio, 367 U.S. 643 (1961), which held exclusionary rule applicable to state criminal prosecutions).

155 *See generally* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960).

doctrine,[156] its decisions pertaining to coerced confessions confirm the principle that whenever the application of an established constitutional doctrine to a particular fact situation produces a new result, either because new data has been brought to the Court's attention or the Court is willing to revise its assumptions about human behavior, the result will not be treated as a new constitutional decision.[157] Thus, even though it has been established since at least 1936 that the introduction of a coerced confession in a state criminal case constitutes a violation of the fourteenth amendment's due process clause,[158] modern assumptions concerning the effect of psychological pressure on a defendant have greatly expanded the constitutional definition of coercion. For example, although a voluntary confession has long been defined as one which is a product of a defendant's free and rational choice,[159] increasingly sophisticated notions pertaining to the operation of the human mind have broadened the concept of free and rational choice. The definition of an uncoerced confession has evolved from one where the choice was not the "result of torture, physical or psychological"[160] to one which involves a decision made without the interference of significant police pressure.[161] As a result, both the quantity and quality of police questioning which will establish an impermissible influence on the defendant's will have been significantly reduced.[162] However, despite these significant reinterpretations of the definition of coercion, the Court has implied that the current definition of a constitutionally coerced confession must be given retroactive effect.[163]

Since generally only decisions announcing a new constitutional rule may be denied retroactive effect, analysis in the present case must focus on whether a decision invalidating convictions rendered by a death-qualified jury would be a "new decision" in the constitutional sense. Since the analysis of this issue will vary depending on the consti-

156 *But see* Muniz v. Beto, 434 F.2d 697, 705 (5th Cir. 1970).

157 *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960).

158 *See* Brown v. Mississippi, 297 U.S. 278 (1936); *cf.* Wilson v. United States, 162 U.S. 613 (1896) (excluding use of coerced confession in federal courts).

159 *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 207 (1960) ("rational choice"). *See generally Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 973-74 (1966).

160 United States v. Mitchell, 322 U.S. 65, 68 (1944) (dictum).

161 *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963). *See generally Developments in the Law, supra* note 159, at 973-74.

162 *Compare* Haynes v. Washington, 373 U.S. 503 (1963), *with* Stein v. New York, 346 U.S. 156 (1953). *See generally* Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 725-27 (1966); *Developments in the Law, supra* note 159, at 973-74.

163 *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966).

tutional ground utilized, each of the three constitutional theories discussed earlier in this article will be separately examined.

1. *The Claim that the Jury Is Unrepresentative as to Guilt*

If the Court accepts the argument that the jury is unrepresentative as to guilt because of the systematic exclusion of a legally cognizable group of citizens (*i.e.*, those who are opposed to capital punishment), no new constitutional principle will be established, because it has been settled since 1879 that the exclusion of a legally cognizable group of citizens constitutes a denial of equal protection.[164] As the Court stated in *Hernandez v. Texas*,[165] the determination of whether a legally cognizable group "exists within a community is a question of fact"[166] to be decided on the basis of whatever evidence may be adduced concerning the extent to which the class of jurors excluded may have a more favorable attitude toward the defendant than those eligible to serve.[167] In *Muniz v. Beto*,[168] the Fifth Circuit held that *Hernandez* must be afforded retroactive application, rejecting the state's argument to the contrary:[169]

> [W]ith regard to this contention we take note of the fact that the Supreme Court, in a series of recent decisions beginning with Linkletter v. Walker . . . has made it clear that *new* constitutional interpretations related to criminal procedure may sometimes be denied retroactive application. . . .
>
> The problem with the State's argument is that the present case does not involve any *new* constitutional interpretation. . . . [W]e merely apply a well-settled doctrine of long standing.[170]

A holding that the elimination of veniremen opposed to capital punishment constitutes the exclusion of a legally cognizable class would be an application of the same "well-settled doctrine." Therefore, a strong argument emerges in favor of affording such a holding retroactive application.[171]

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164 *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

165 347 U.S. 475 (1954).

166 *Id.* at 478.

167 *See* notes 72-75 and accompanying text *supra*.

168 434 F.2d 697 (5th Cir. 1970).

169 The state also argued that the facts of *Muniz* did not fall within the holding of *Hernandez* because the exclusion of Mexican-American citizens was not purposeful. *Id.* at 705.

170 *Id.*

171 On the other hand, the state may argue that the significant step from *Strauder* and *Hernandez*, in which the excluded veniremen belonged to specific minority groups, to the present situation, in which the veniremen have a disproportionate tendency to adhere to well-defined attitudes, is bridged only by *Glasser*'s and *Witherspoon*'s recognition that

2. *The Claim that the Defendant's Risks of Conviction Are Substantially Increased*

A holding invalidating convictions on the ground that a death-qualified jury "substantially increases the risk of conviction"[172] should be treated as a new constitutional decision. Before *Witherspoon*, a defendant's claim that a jury-selection process different from the one employed in his case might result in the selection of a jury generally more favorably disposed toward him, would be unsuccessful unless the defendant could show that the individual jurors actually chosen were unconstitutionally biased against him.[173] *Witherspoon* did not change this rule. Indeed, Mr. Justice Stewart took pains to emphasize that the Court was neither considering nor deciding *anything* with respect to a claim premised on the assumption that the exclusion of jurors opposed to capital punishment would significantly increase the risks of conviction.[174] Accordingly, if the Court were now to decide that a death-qualified jury significantly increased a defendant's risk of conviction,

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a veniremen's expressed opinion is one reliable index which may be utilized for the purpose of defining a legally cognizable group. Viewed in this light, a holding that the selection of a death-qualified jury excludes a legally cognizable group could justifiably be accepted as expounding new constitutional doctrine. *See* notes 93-110 and accompanying text *supra*.

172 Witherspoon v. Illinois, 391 U.S. 510, 518 (1968).

173 *See* Irvin v. Dowd, 366 U.S. 717 (1961).

174 391 U.S. at 520 n.18 (emphasis in original):

> [A] defendant convicted by . . . a jury [selected pursuant to a post-*Witherspoon* test] in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendaut's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both iuterests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

In response, a defendant might argne that invalidation of a conviction reached by a death-qualified jury on these grounds is merely a new application of an old principle, *i.e.*, in a criminal case a defendant has a constitutional right to a trial before an impartial finder of fact. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510 (1927) (invalidating conviction rendered by judge who had interest in outcome of case). Indeed, *Witherspoon*'s reliance on *Glasser* might lend support to such an argument.

A conclusion that an invalidation of a conviction reached by a death-qualified jury is merely a new application of an existing constitutional principle is initially appealing; however, it is seriously flawed. In deciding *Witherspoon*, the Court indicated that the decision announced a new constitutional doctrine. 391 U.S. at 523 n.22. The carefully phrased dictum of the Court, admitting that a conviction handed down by a death-qualified jury might be invalid, was part of that decision. Accordingly, that dictum was also part of the new constitutional rule.

it would be breaking new constitutional ground and the retroactivity of such a decision would be in doubt.

3. *The Claim that the Defendant's Right to Equal Protection Has Been Violated*

A holding that the existence of a dual system of jury selection constitutes a denial of equal protection to the group of defendants who are subjected to death-qualified juries would probably constitute a new application of the constitutional principle announced by the Court in *Fay v. New York*.[175] It would also constitute a clear application of the well-established rule that, absent a compelling state interest, a state may not establish a classification which infringes upon fundamental rights.[176] In applying this constitutional rule to new factual situations, the Court has never suggested that a finding of a new invidious classification results in a new constitutional decision. On the contrary, in the one instance in which the Court faced this question, the claim that a far-reaching application of the equal protection clause should be treated as a new constitutional principle was impliedly rejected without discussion. In *Smith v. Crause*,[177] the Kansas Supreme Court had held that *Douglas v. California*[178] should not be retroactively applied to convictions which were finalized prior to the effective date of *Douglas*.[179] In reversing per curiam, the Supreme Court merely cited the *Douglas* decision.[180] This apparently indicates that the Court did not view *Douglas* as establishing new constitutional doctrine but rather as a new application of preexisting constitutional principles.[181] Since the constitutional principle applicable in *Douglas* would support an equal protection holding in the present case, a decision that a dual system of jury selection denies equal protection to defendants in capital cases would not constitute a new decision in the constitutional sense.[182]

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175 332 U.S. 261 (1947).

176 *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

177 192 Kan. 171, 386 P.2d 295 (1963).

178 372 U.S. 353 (1963).

179 192 Kan. at 179, 286 P.2d at 301.

180 Smith v. Crause, 378 U.S. 584 (1964).

181 Griffin v. Illinois, 351 U.S. 12 (1956); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

182 Since *Smith* was decided prior to Linkletter v. Walker, 381 U.S. 618 (1965), the first Supreme Court ruling to apply a new constitutional decision prospectively, it might be argued that when *Smith* was handed down the Court did not consider it appropriate to apply a new constitutional doctrine prospectively. However, since the lower court expressly based its ruling on a prospective application of *Douglas*, the Supreme Court's re-

Thus, although the question is certainly not free from doubt, any holding that convictions rendered by death-qualified juries are constitutionally invalid could reasonably be considered a new application of preexisting constitutional doctrine.[183] If so, then the holding would require retroactive effect.

B. *The Problem of Retroactivity*

1. *The Test for Determining the Retroactivity of a New Constitutional Decision*

In determining whether a new constitutional rule should be given retroactive or merely prospective effect, the Supreme Court has created a three-part analysis:

> The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.[184]

In assaying the purpose to be served by a new constitutional standard, a primary consideration emphasized by the courts is the extent to which the new rule was designed to remove a defect in the fact-finding process.[185] Whereas new decisions which are primarily designed

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fusal even to mention the word "retroactivity" in its affirmance seems to support the reading of the case suggested in the text.

The state could respond that although its interest in obtaining a death penalty was illusory (*see* text accompanying note 151 *supra*), the presence of this apparently valid interest at the time of the defendant's trial constituted a reasonable basis for distinguishing this invidious classification from those situations in which the state never had even an illusory interest. However, even assuming that the state's illusory interest in obtaining a death sentence was valid, it is still questionable whether this interest could be considered compelling, especially in view of the fact that the state could safeguard this interest by the less restrictive alternative of "using one jury to decide guilt and another to fix punishment." Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968).

183 With respect to the claim that the practice of obtaining a death-qualified jury operates as an indirect systematic exclusion of black veniremen, a defendant could argue that the acceptance of this claim would constitute nothing more than an application of the principle articulated in *Strauder* and amplified in cases such as Hill v. Texas, 316 U.S. 400 (1972), and Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966). Again, however, the prosecution could assert that the special circumstances of the exclusionary system sufficiently distinguish this case from prior cases to assert that a new constitutional principle is being established.

184 Stovall v. Denno, 388 U.S. 293, 297 (1967) (dictum); *see* Linkletter v. Walker, 381 U.S. 618, 629 (1965).

185 *See, e.g.*, Berger v. California, 393 U.S. 314, 315 (1969) (per curiam); Roberts v. Russell, 392 U.S. 293, 294 (1968) (per curiam); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968).

to deter improper police conduct are almost invariably afforded only prospective effect,[186] constitutional innovations in the adversary process itself are generally given retroactive application because of their significant potential for safeguarding the innocent by improving the integrity of the fact-finding process.[187] Moreover, in applying the three-part test, the determination of whether the purpose of the new doctrine relates to the fact-finding process has been identified as by far the most siguificant:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.[188]

Thus, the enunciated principles relating to retroactivity apparently indicate that a new decision invalidating convictions rendered by a death-qualified jury must be given retroactive effect if it is found that the decision removes a substantial impediment to the fact-finding process.

2. *The Effect of the New Rule on the Fact-Finding Process*

A decision holding that convictions rendered by a death-qualified jury are invalid will almost inevitably be premised upon a finding that the exclusion of jurors opposed to capital punishment creates a con-

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186 *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (requirement that police provide counsel at post-indictment lineup); Johnson v. New Jersey, 384 U.S. 719 (1966) (requirement that police warn defendants of constitutional rights in pretrial interrogation); Linkletter v. Walker, 381 U.S. 618 (1965) (application of exclusionary rule).

187 *See, e.g.*, cases cited in note 185 *supra*. Of course, a finding that the new constitutional rule improves the fact-finding process is not the only basis upon which the Supreme Court will apply a new rule retroactively. As the Fourth Circuit stated in United States v. Miller, 406 F.2d 1100, 1103 (4th Cir. 1969):

> The Court's emphasis in its retroactivity decisions on the importance of reliable fact-finding procedures is simply one frequently articulated aspect of its concern that all convictions past and present shall be the product of fundamentally fair proceedings.

At least two of the recent circuit court decisions which have applied new constitutional doctrines retroactively do not seem to have been premised upon a need to improve the reliability of the fact-finding process. *See* Edmaiston v. Neil, 452 F.2d 494 (6th Cir. 1971) (retroactive application of Dickey v. Florida, 398 U.S. 30 (1970), which articulated new principles concerning state defendant's constitutional right to speedy trial); Mullreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970) (retroactive application of Benton v. Maryland, 395 U.S. 784 (1969), which held double jeopardy clause applicable to states).

188 Williams v. United States, 401 U.S. 646, 653 (1971).

stitutionally significant increase in a defendant's chance of conviction. By excluding those potential jurors, the defendant is not only being deprived of a jury representing a proper cross-section of the community, he is also losing the benefit of being judged by a group which would tend to be more favorable to him on the question of his guilt or innocence.[189] Such a system is prejudicial to a capital defendant for two reasons. It places his fate in the hands of a jury that may be less than impartial, and it places a burden on a capital defendant not shared by defendants in noncapital cases.[190] Viewed in this light, a ruling by the Supreme Court invalidating convictions rendered by death-qualified juries could be applied retroactively even if it is considered a new constitutional doctrine.

In *Jackson v. Denno*[191] and *Bruton v. United States*,[192] the Supreme Court adopted new constitutional rules to guard against possible prejudice to defendants resulting from the inability of one or more jurors to comply with a trial judge's cautionary instructions.[193] In holding both rulings retroactive,[194] the Court never discussed the magnitude of the potential prejudice eliminated as a result of the new rulings, but merely emphasized that the decisions were calculated to remove a " 'serious flaw in the fact-finding process at trial.' "[195] The Court's analysis implies that rulings designed to eliminate prejudice in the actual adjudication of a case will automatically be given retroactive application. If this is so, the exclusion of veniremen because of their opposition to capital punishment presents an even stronger case for retroactive application than either *Jackson* or *Bruton*. Whereas both cases were designed to safeguard the fact-finding process by protecting jurors from exposure to possibly prejudicial evidence, the present situation involves a rule which is desigued to remedy the more fundamental risk of inherent prejudice against criminal defendants.

Witherspoon itself provides further support for this analysis. In

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189 *See* notes 66-89 and accompanying text *supra*.

190 *See* notes 131-50 and accompanying text *supra*.

191 378 U.S. 368 (1964).

192 391 U.S. 123 (1968).

193 In *Jackson*, the Supreme Court held unconstitutional a procedure under which the same jury which passed on guilt or innocence also determined the admissibility of a defendant's confession. 378 U.S. at 388. In *Bruton*, the Court held that the admission at a joint trial of a codefendant's confession which implicated the defendant violated the defendant's sixth amendment right to confrontation. 391 U.S. at 126.

194 *Jackson* was held retroactive by implication in Owen v. Arizona, 378 U.S. 574 (1964) (per curiam). *See also* Linkletter v. Walker, 381 U.S. 618, 638 (1965). *Bruton* was held retroactive in Roberts v. Russell, 392 U.S. 293 (1968) (per curiam).

195 Roberts v. Russell, 392 U.S. 293, 294 (1968).

holding its new constitutional rule retroactive,[196] the Court made no attempt to assess the actual impact which the exclusion of particular jurors would have on the outcome of the case. Rather, the Court emphasized "that the jury-selection standards employed here necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate."[197] Since a decision invalidating the exclusion of jurors solely on the basis of their opposition to capital punishment would be similar to *Witherspoon* in that a new procedure of jury selection would have to be devised to eliminate potential prejudice, the above quoted language in *Witherspoon* presents another argument in favor of affording the decision retroactive effect without any specific examination of the precise extent to which the new doctrine will actually safeguard defendants from prejudice.[198]

Moreover, a specific examination of the extent to which such a new decision reduces prejudice further strengthens the argument in favor of a retroactive holding. As noted, in close or doubtful cases, the likely effect of holding both pre-*Witherspoon* and post-*Witherspoon* exclusionary tests invalid would be to give the defendant an additional vote for acquittal[199] on the first ballot approximately twelve percent of the time when he is being tried by a twelve man jury[200] and almost six percent of the time when there is a six man jury.[201] Because the vote on the first ballot is decisive in a large proportion of criminal trials,[202] the addition of this vote for acquittal would undoubtedly have made the crucial difference in many cases.

It is difficult to compare the probable impact of the hypothetical ruling with that of the rules established in *Jackson*, *Roberts*, or *Witherspoon*. However, it seems fair to conclude that in certain situations[203] the hypothetical ruling's impact on the fact-finding process would be at

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196 391 U.S. at 522-23.

197 *Id.* at 523 n.22.

198 It must be acknowledged that in determining whether *Witherspoon* should be applied retroactively the Court did take into account both "the reliance of law enforcement officers" and the new rule's impact "on the administration of justice." *Id*; *see* notes 205-09 and accompanying text *infra*.

199 A more precise estimate of the likelihood of prejudice in a particular case may be assessed by considering the exact number of veniremen excluded in that case. *Cf.* notes 230-32 and accompanying text *infra*. However, it will never be possible to calculate the exact effect of an exclusionary rule on the outcome of any case.

200 *See* note 117 and accompanying text *supra*.

201 *See* note 118 and accompanying text *supra*.

202 *See* note 42 and accompanying text *supra*.

203 An example would be cases in which the elimination of the post-*Witherspoon* exclusionary test actually led to the replacement of at least one juror who would vote for conviction with one or more who would vote for acquittal.

least as great as the impact of any of those cases. The fact that there may be some cases in which the application of the new rule would not have affected the defendant's chances of acquittal should be constitutionally irrelevant.[204]

3. The Effect of Law Enforcement's Reliance on the Old Rule

Although the Supreme Court has indicated that a new constitutional rule's effect on the fact-finding process is of overriding importance,[205] the Court's decisions demonstrate that the question of retroactivity also involves a delicate balancing process in which a number of factors must be afforded substantial consideration.[206] A retroactive invalidation of all convictions rendered by death-qualified juries would have dramatic (and to some, the most catastrophic) impact on the administration of justice. Retrials (and in many cases, freedom)[207] would be required for not only the vast majority of those formerly on death row, but also for thousands of prisoners who, although not sentenced to death, were nevertheless convicted of heinous crimes.[208] In this extreme case, the impact on the administration of justice of the new rule's fully retroactive application would seem to outweigh the rule's salutary improvement on the integrity of the fact-finding process.

Although a fully retroactive application of the new rule may be unacceptable, a totally prospective application is neither required nor appropriate.[209] In determining an appropriate middle-ground between these two extremes, the Supreme Court has identified a particularly

204 *See* note 131 *supra*. *See also* Douglas v. California, 372 U.S. 353 (1963). The inability of any particular defendant to establish that he was unfairly prejudiced by the operation of a procedure which selected death-qualified jurors strengthens the argument in favor of retroactivity because it provides a basis for claiming that there is no alternative remedy available for defendants who were prejudiced and yet denied the effect of a new constitutional ruling. As Justice Brennan has noted, an evaluation of the Court's prospective ruling shows that "in all cases save *Tehan* and *DeStefano/Duncan*, alternate methods were still available to those who could demonstrate that the feared injustice had in fact resulted." United States v. United States Coin & Currency, 401 U.S. 715, 730 (1971) (Brennan, J., concurring).

205 *See* note 188 and accompanying text *supra*.

200 Stovall v. Denno, 388 U.S. 293, 297 (1967).

207 Of course, because of the serious nature of the cases involved, prosecutors would be likely to preserve the evidence if possible. Thus, the chances that the reversal of a conviction in a capital case would lead to automatic freedom (without the possibility of a retrial) might be reduced.

208 *See* note 153 *supra*.

209 In many of the cases in which the Court adopted an essentially prospective rule, the new rule was still applied to conduct which took place prior to the rule's announcement. *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (constitutional rule announced in Miranda v. Arizona, 384 U.S. 436 (1966), applicable in all pre-*Miranda* cases in which defendant had not yet been brought to trial).

significant factor: "[t]he extent of the reliance by law enforcement authorities on the old standards."[210] That reliance will, in turn, depend upon whether the particular case in question was tried pre-*Witherspoon*, post-*Witherspoon* but pre-*Furman*, or post-*Furman*.

a. *Pre*-Witherspoon *Cases*. With respect to all pre-*Witherspoon* cases, the state's reliance interest is very strong. Prior to the Court's ruling in that case, states reasonably believed that the exclusion of veniremen opposed to capital punishment was permissible for the purpose of safeguarding the state's legitimate interest in obtaining death sentences in appropriate cases.[211] Although *Witherspoon* held that the state's interest does not justify the exclusion of this group, the *Witherspoon* majority's admission that a new constitutional rule was announced in that case [212] negates any claim that law enforcement agencies' reliance on the constitutional validity of the pre-*Witherspoon* practice was unreasonable. Accordingly, with respect to these cases, a state's argument against a retroactive invalidation of convictions rendered by death-qualified juries is relatively strong.

b. *Post*-Witherspoon, *Pre*-Furman *Cases*. The *Witherspoon* majority's "thinly veiled warning to the States"[213] that exclusion of any veniremen opposed to capital punishment might render the jury incapable of rendering an impartial verdict as to guilt[214] substantially undermines any justifiable reliance by the state with respect to the continued use of a death-qualified jury. Although the state may plausibly assert that exclusions pursuant to a post-*Witherspoon* test were justified for the purpose of maintaining its apparently legitimate interest in selecting a jury capable of imposing a capital sentence, *Witherspoon* provided the state with explicit notice that a defendant convicted by a jury selected pursuant to this exclusionary test might successfully invalidate his conviction by "establish[ing] that the jury was less than neutral with respect to guilt."[215] In view of this warning, it would seem appropriate to hold that states which continued the practice of excluding veniremen pursuant to a post-*Witherspoon* test did not do so with justifiable reliance on the constitutional validity of the practice, but

210 Stovall v. Denno, 388 U.S. 293, 297 (1967) (dictum).

211 It must be acknowledged, however, that in some post-*Witherspoon* cases state courts allowed exclusions which seemed to go far beyond what was appropriate for the purpose of protecting this interest. *See, e.g., In re* Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968).

212 391 U.S. at 523 n.22.

213 *Id.* at 539 (Black, J., dissenting).

214 This warning applied with respect to the exclusion of veniremen pursuant to either a pre-*Witherspoon* test (*id.* at 518) or a post-*Witherspoon* one. *Id.* at 520 n.18.

215 *Id.* at 520 n.18.

rather with knowledge that they were taking a calculated risk "that their murder convictions [had] been obtained unconstitutionally."[216]

c. *Post*-Furman *Cases*. In post-*Furman* cases, convictions rendered pursuant to a discretionary sentencing procedure must be distinguished from those rendered pursuant to a mandatory statute. With respect to the former, *Furman's* unequivocal holding that no death sentence may be validly imposed in such cases[217] negates any plausible reliance interest on the part of law enforcement officials.

With respect to convictions rendered pursuant to a mandatory capital statute, law enforcement agencies may still assert a reliance interest on the ground that a death-qualified jury is necessary to enforce the state's interest in obtaining capital sentences.[218] This interest, however, is undercut by two factors. First, as in all post-*Witherspoon* cases, the state is on notice that convictions rendered by death-qualified juries may be constitutionally invalid.[219] Second, *Furman*'s holding provides notice that a death penalty imposed pursuant to a statute imposing mandatory capital punishment *may* still be unconstitutional.[220] While the constitutionality of mandatory capital punishment is beyond the scope of this Article, it must be emphasized that no member of the *Furman* majority stated or implied that any form of mandatory capital punishment would be acceptable.[221] Two members of the Court clearly indicated that any form of capital punishment would be unacceptable,[222] and Mr. Chief Justice Burger, speaking for all four dissenting Justices, expressed his fear that the Court's rationale would uphold the constitutionality of mandatory capital sentencing only

> if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal.[223]

Thus, the serious doubt as to the constitutional validity of most, if not

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216 *Id.* at 539 (Black, J., dissenting).

217 *See* note 3 *supra*. *See also* Moore v. Illinois, 408 U.S. 786, 800 (1972) (interpreting *Furman* as invalidating state statutes allowing discretionary imposition of death penalty).

218 The state's interest in a mandatory death penalty is slightly different. Because there can be no bifurcation of the issues of guilt and sentencing, there is no means by which the state's interest in obtaining the death penalty and the defendant's interest in obtaining "a completely fair determination of guilt or innocence" can both be accommodated. *See* Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968).

219 *See* notes 213-16 and accompanying text *supra*.

220 *See* notes 221-24 and accompanying text *infra*.

221 *See* note 2 *supra*.

222 *See* note 2 *supra*.

223 408 U.S. at 401 (Burger, C.J., dissenting).

all,[224] mandatory capital sentence statutes provides notice to the state that there may be no legitimate governmental interest in obtaining a death sentence pursuant to one of these statutes. This notice, compounded with the notice that verdicts rendered by death-qualified juries in post-*Witherspoon* cases may be unconstitutional, renders the state's reliance argument extremely weak in this class of cases.

C. *A Proposed Rule of Retroactivity*

If it is held that convictions rendered by a death-qualified jury are constitutionally invalid, the decision will be one of extraordinarily high public visibility. Since the courts are undoubtedly political institutions, ultimately subject to the will of the people, it is appropriate to consider the effect of the rule on public opinion. Although an argument can be made in favor of affording complete retroactivity to the rule,[225] the political implications of this result render it inadvisable, if not unthinkable. Similarly, a rule which would distinguish between pre-*Witherspoon* and post-*Witherspoon*, pre-*Furman* cases might also have unfortunate political consequences, since the judiciary might appear to be affording disparate treatment to defendants who are essentially similarly situated.[226]

In order to obtain an optimum balance between limiting the adverse political consequences of the new rule and safeguarding the rights of both past and future defendants, the Court should hold that in pre-*Furman* cases,[227] convictions rendered by death-qualified juries will be invalidated only upon a showing of substantial prejudice.[228] In applying the test of substantial prejudice, two factors should

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224 *See* note 2 *supra*.

225 *See* notes 151-204 and accompanying text *supra*.

226 Thus, the political viability of the new rule announced in Miranda v. Arizona, 384 U.S. 436 (1966), was not enhanced by the Court's decision to apply the rule to four defendants while refusing to apply it to more than one hundred other defendants with apparently indistinguishable cases before the Court. *See generally* F. GRAHAM, THE SELF-INFLICTED WOUND 161 (1970).

227 In cases of post-*Furman* convictions rendered by death-qualified juries with discretionary sentencing authority, a fully retroactive application of the new constitutional rule seems appropriate in view of the absence of any legitimate state reliance on the old rule. *See* text accompanying notes 217-24 *supra*. The proper disposition of convictions rendered by death-qualified juries acting pursuant to a mandatory capital punishment statute is beyond the scope of this Article. *See* note 16 *supra*.

228 For example, in United States v. Jackson, 390 U.S. 570 (1968), the Court invalidated the death penalty provision of the Federal Kidnapping Act (18 U.S.C. § 1201(a) (1970)), and held that in granting the right to impose capital punishment exclusively to the jury which convicted the defendant, the Act placed an impermissible burden on the defendant's right to a jury trial. However, in Brady v. United States, 397 U.S. 742 (1970), the Court held that a guilty plea entered in a pre-*Jackson* case would not be rendered invalid merely on a

be evaluated. First, the court should consider the number of excluded veniremen. Although there is no precise correlation between the number of excluded veniremen and the extent to which any particular defendant is prejudiced,[229] clearly the likelihood of prejudice increases as more veniremen are excluded. Appropriate distinctions may be drawn between cases involving the elimination of only a few veniremen[230] and those in which many were excluded.[231] However, since the ultimate test is one of substantial prejudice, no precise numerical lines need be drawn. Since the exclusion of any given number of veniremen will be likely to have more impact in a close or doubtful case,[232] an examination of the trial record should also be required. When an examination of the record indicates that the evidence was probably such as to denote a significant doubt as to the outcome, the exclusion of even a few veniremen should be sufficient to invalidate the conviction. When a doubt as to the outcome decreases, an increased number of improper exclusions should be required for reversal. Finally, in pre-*Furman* cases, courts should automatically refuse to reverse convictions in which the evidence of guilt was so overwhelming as to afford no substantial basis for believing that the unconstitutional system of jury selection could have affected the outcome.[233]

While not easy to apply, this approach would come close to striking an optimum balance between the various competing interests. Without mandating the wholesale release of persons already convicted of vicious crimes, the approach would apply a principled rule which would differentiate cases, not on the basis of arbitrary distinctions relating to the time of a particular event, but rather on the basis of prejudice to the defendant, a concern far more justifiable. Moreover, through such an approach, future defendants would be protected from an uncon-

showing that the plea would not have been entered except for the existence of the provision of the federal statute held invalid in *Jackson*.

229 *See* notes 117-18 and accompanying text *supra*.

230 *See, e.g.*, Marion v. Beto, 434 F.2d 29 (5th Cir. 1971).

231 *See, e.g.*, People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968), *rev'd per curiam*, 403 U.S. 946 (1971).

232 *See* notes 34-36 and accompanying text *supra*.

233 *Cf.* United States *ex rel.* Johnson v. Rundle, 349 F.2d 416 (3d Cir. 1965); United States *ex rel.* Rucker v. Myers, 311 F.2d 311 (3d Cir. 1963); United States *ex rel.* Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962). In these cases, the Third Circuit utilized a standard of substantial prejudice to determine whether the prejudice to a defendant from the introduction of his prior criminal record in a unitary criminal trial was sufficient to constitute a denial of due process. Subsequently, the Supreme Court removed the necessity for this approach by holding that the admission of a prior criminal record in a trial would not ordinarily give rise to a due process claim. Spencer v. Texas, 385 U.S. 554 (1967); *cf.* McGautha v. California, 402 U.S. 183 (1971).

stitutional jury selection process, while the most egregious injustices of the past would be corrected.

CONCLUSION

The dissent in *Thompson v. State*[234] vividly portrayed the effect of the use of death-qualified juries:

> To automatically discharge all prospective jurors because they have conscientious scruples against capital punishment is the equivalent of stacking the jury in favor of the prosecution and against the defendant. It is just as rational to excuse for cause all prospective jurors who favor capital punishment, all Negroes because the accused is black, or all white women because the victim is a white woman. . . .
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> . . . To exclude one group because of a certain philosophy, destroys the common sense, sensitivity and balance of the venire.[235]

By confirming the essential validity of these observations, the results from the post-*Witherspoon* studies form the basis for several strong constitutional arguments in favor of holding that convictions rendered by the exclusion of veniremen opposed to capital punishment are constitutionally invalid.

The implications of these arguments have tremendous significance not only with respect to future prosecutorial attempts to obtain a death penalty, but also with respect to prior convictions rendered by death-qualified juries. If the arguments are accepted, a court will be confronted with the delicate task of determining precisely which prior convictions must be invalidated. Although the formulation of an appropriate rule is difficult, involving a balancing of political as well as legal considerations, the adoption of the approach suggested in this Article should yield a satisfactory and just result.

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234 246 So. 2d 760 (Fla. 1971).

235 *Id.* at 766 (Revels, J., dissenting).